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Elizabeth S. Landis

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## SOUTH WEST AFRICA IN THE INTERNATIONAL COURT: ACT II, SCENE 1

*Elizabeth S. Landis†*

On December 21, 1962, fifteen judges of the International Court of Justice, in nine opinions and one declaration totalling 347 printed pages, handed down a decision<sup>1</sup> which may well signal the beginning of extensive political changes in Southern Africa. Yet despite the importance of the issues directly and indirectly involved, the fascinating arguments developed, and the drama of the eight-seven split in the court's decision, the case remains unknown to the public at large and even to many members of the Bar.

That the decision remains in relative obscurity is not so astonishing when one realizes the obstacles in the path of even the most interested nonspecialist who wants to plow his way through the inch-thick volume of opinions: first of all, he must master the unfamiliar terminology of the court and of the mandates system of the League of Nations, distinguishing among the various meanings attributed to the same words<sup>2</sup> and never confusing them with different or looser popular usage. He must further distinguish between, and respond automatically and correctly to, a whole battery of apparent code numbers, for the key documents<sup>3</sup> to which reference is made repeatedly are all subdivided into "Articles." Finally, he must follow unhesitatingly the intricacies of post-World War I international maneuvering, which caused the preceding generation of Americans to throw up its hands in dismay and to withdraw to the relative safety of the New World.

Nevertheless, with the necessary historical and terminological back-

† Professor of African Studies, American College in Paris. A.B., Mount Holyoke College 1942; M.S. in Pub. Admin., Syracuse Univ. 1943; LL.B., Cornell Univ. 1948; Dr. en Droit, Univ. of Lyon (France) 1950; Co-Editor, *Liberian Code of Laws* of 1956.

<sup>1</sup> South West Africa Cases, [1962] I.C.J. Rep. 319 [hereinafter cited SWA Cases]. These cases disposed of the preliminary objections in the cases between Ethiopia and South Africa, and Liberia and South Africa.

<sup>2</sup> See note 114 *infra*.

<sup>3</sup> League of Nations Covenant [hereinafter cited Covenant]; the mandate for South West Africa [hereinafter cited Mandate]; U.N. Charter [hereinafter cited Charter]; and Stat. Int'l Ct. of Just.

ground it is possible to read and understand the *South West Africa Cases*, to appreciate their significance in the current Afro-Asian attempts to end "colonialism" in Southern Africa, and to anticipate the second scene of Act II of the South West Africa drama. The purpose of this article is to present such a background and to summarize the opinions of the court and the judges, so that, as far as possible, the major issues are clarified and the arguments relating to each issue are presented in juxtaposition.

## PROLOGUE

### *The Setting*<sup>4</sup>

South West Africa is an infertile desert and semidesert area of more than 300,000 square miles<sup>5</sup> lying along the South Atlantic athwart the Tropic of Capricorn. To the south and southeast it is bounded by the Republic of South Africa;<sup>6</sup> to the east by the British Protectorate of Bechuanaland; and to the north by the Portuguese territory of Angola. At the extreme northeast of the country a thin sliver of territory<sup>7</sup> stretches almost 300 miles east to the border of Northern Rhodesia. Due to lack of water—there is no permanent watercourse in the country, and most regions receive less than ten inches of rain annually—stock-raising is the principal agricultural pursuit. There are considerable mineral deposits in the northern part of the country, and diamonds are found in relative abundance in the alluvial sands along several hundred miles of the southern coastline.<sup>8</sup>

There are somewhat more than 400,000 Africans<sup>9</sup> in South West

<sup>4</sup> The literature on South West Africa is pathetically inadequate. Generally the territory is treated as an adjunct to South Africa, if it is mentioned at all. The best general political handbook is First, *South West Africa* (1963) [hereinafter cited First] written by a South African journalist now under house arrest or in detention for her opposition to apartheid. The book contains a bibliography. Conditions in South West Africa are summarized in the annual reports made to the U.N. General Assembly by its Committee on South West Africa (and its predecessor ad hoc Committee and its successor Special Committee) [all hereinafter cited SWA Comm.].

<sup>5</sup> SWA Comm. 8 (A/2913) (1955) gives the exact area as 317,940 square miles, excluding Walvis Bay (374 square miles), which remains an integral part of the South African Province of the Cape of Good Hope. Texas has approximately 265,000 square miles.

<sup>6</sup> The former Union of South Africa, as the respondent was when Ethiopia and Liberia commenced their proceedings, became a republic in 1961. This article refers to the "Union" in relation to actions which took place before the change and to the "Republic" as to continuing actions or conditions or as to actions which took place since the Republic came into existence.

<sup>7</sup> The Caprivi Zipfcl.

<sup>8</sup> SWA Comm. 8 (A/2913) (1955); Boyd & van Rensburg, *An Atlas of African Affairs* 120-21 (1962); Stamp, *Africa: A Study in Tropical Development* 486-89 (1953). Appendix D of First contains information concerning foreign investment in South West Africa, most of it for mineral exploitation.

<sup>9</sup> In Africa south of the Sahara this term refers to relatively pure-blooded indigenous peoples (i.e., those with no appreciable Caucasian or Asian ancestry). "Old Africa hands" and resident whites tend to use the term "native," but this has become a term of opprobrium to those to whom it is applied.

Africa, primarily Hereros (a Bantu people from west of Lake Tanganyika), Namas (often called Hottentots), the Berg-Damara (also called Damaras and Bergdamas, a people of unknown origin), the Ovambo (supposed to have migrated from the Central African lake district), and the Bushmen (descendants of the region's earliest inhabitants, these small, yellow-skinned people who speak a unique "click" language are believed to be in danger of extinction within the next few decades).<sup>10</sup> In addition, there are about 25,000 "coloreds" (persons of mixed descent),<sup>11</sup> including the Rehoboth "Bastards," a unique community with strong traditions,<sup>12</sup> and 73,000 whites, mostly of German and South African origin.<sup>13</sup> The white population lives in the so-called Police Zone, which comprises about fifty-eight per cent of occupied South West Africa, including the diamond areas.<sup>14</sup> Africans who are not laborers in white enterprises must reside outside the Zone or in closed "native reserves" within the Zone.<sup>15</sup>

### *History: Creation of the South West Africa Mandate*

For the purpose of understanding the *South West Africa Cases*, history begins when Bismarck, stealing a march on the British, established the Colony of German South West Africa just across the Orange River from the British Cape Colony. While the Germans engaged in the murderous business of "pacifying" the rebellious tribes in their own colony, their British and Dutch neighbors to the south were involved in the mutual slaughter of the Boer Wars. Subsequent attempts at reconciliation led to the formation of the Union of South Africa, dominated financially by the British, but politically by the Boers. When the First World War

<sup>10</sup> First 25-41, 45-48, app. E. Population figures cited by the SWA Comm. 9 (A/2913) (1955) suggest that the nonwhite population is increasing somewhat more rapidly than the white population.

The Bushmen are being forced by the pressure of white (and other nonwhite) to expansion ever further into the uninhabitable Kalahari Desert.

<sup>11</sup> First app. E. Stamp, *supra* note 8, at 541 lists about 53,000 coloreds. This apparent change or discrepancy probably reflects uncertainty in the classification of certain groups of the population. Rehobothers, for example, are classified as "natives" while resident in South West Africa but as "coloreds" if in the Republic. On racial classification in the Republic generally, see Landis, "South African Apartheid Legislation I," 71 Yale L.J. 1, 4-16 (1961) (particularly 14-16 which refers to the Population Registration Act).

<sup>12</sup> First 41-45.

<sup>13</sup> *Id.* at 49-57, app. E.

<sup>14</sup> International Status of South-West Africa, [1950] I.C.J. Rep. 128 (advisory opinion) [hereinafter cited SWA Status]; Statement of Representative of the Secretary-General on SWA Status 18 [hereinafter cited Kernol]; SWA Comm. 11 (A/2913) (1955); First 49-57, 121-22, app. E.

<sup>15</sup> SWA Comm. 12 (A/2913) (1955); First 25, 121. The area outside the Police Zone is in the form of an irregular inverted "U," the southernmost tips being some 300 miles from the Angola border. The arms of the inverted U average some 50 miles across, while the base is about 100 miles deep and includes the Caprivi Zipfel. The Police Zone, originally established by the Germans, includes some three quarters of the total land area of South West Africa, but there are some rather sizable "native reserves" within the zone.

started, Afrikaner politicians reluctantly allied their country with their former British enemy. But as early as 1915 they reaped the first benefits of this policy: they captured and occupied the enemy territory of South West Africa.<sup>16</sup>

During the war secret agreements were reached among some of the Allies that claims to occupied German territories would be recognized upon victory, and in 1917 the Imperial War Cabinet agreed to the annexation of South West Africa by the Union.<sup>17</sup> Unfortunately for South Africa, as well as for Australia and New Zealand, which were eyeing German South Pacific islands as their rightful spoils, President Wilson was opposed to annexation of former enemy territories; he wanted the international community to take responsibility for them, although practical administration might be delegated to an individual state acting as agent or *mandatory*.<sup>18</sup> In the winter following the Armistice the victorious Council of Ten resolved these differences by the creation, in *Article 22 of the Covenant of the League of Nations*, of the *mandates system*, under which ex-enemy territories would be governed by individual states acting as *mandatories*, responsible therefor to the League.<sup>19</sup>

Article 22 opened with two paragraphs stating the ideals of the new system:

(1) To [ex-German and ex-Turkish colonies] . . . which . . . are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

(2) The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who . . . can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The colonies ("mandates" or "mandated territories") were then divided into three groups on the basis of the stage of development of the people, their geographical situation, and their economic conditions.<sup>20</sup> In the "A" group were the ex-Turkish colonies of Lebanon, Syria, Iraq, Trans-

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<sup>16</sup> SWA Cases 592; First 61-93; Stamp, *supra* note 8, at 488. For a history of South Africa, see Lewin, *Politics and Law in South Africa* (1963) (a series of interpretative essays relating to race relations in their historical and modern settings); Marquard, *The Peoples and Policies of South Africa* ch. 1 (3d ed. 1962); Walker, *A History of Southern Africa* (3d ed. 1957).

<sup>17</sup> SWA Cases 592 (van Wyk, J., dissenting).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.* at 592, 608-09. The Covenant is set out in full, *id.* at 593-94 (van Wyk, J., dissenting).

<sup>20</sup> Covenant, art. 22, ¶ 3.

jordan, and Palestine, which were sufficiently advanced to be "provisionally recognized" as independent, "subject to the rendering of administrative advice and assistance . . . until . . . they are able to stand alone."<sup>21</sup> Their wishes were to be weighed in selecting the mandatory.<sup>22</sup> Germany's former central African colonies (Tanganyika, Ruanda-Urundi, the Cameroons, and Togoland) comprised the "B" group.<sup>23</sup> The stage of development of these colonies required the mandates to:

[B]e responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion . . . the prohibition of abuses such as the slave trade . . . and will also secure equal opportunities for the trade and commerce of other Members of the League.<sup>24</sup>

The "C" mandates included South West Africa, New Guinea, Nauru, Western Samoa, and the North Pacific Islands.<sup>25</sup> According to Paragraph (6) of Article 22:

[O]wing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory [they could] . . . be best administered under the laws of the Mandatory as integral portions of its territory, subject to . . . safeguards . . . in the interests of the indigenous population.

Paragraph (7) required every mandatory to make an annual report to the Council of the League of Nations on each mandate committed to it. Paragraph (9) provided for the establishment of a commission to examine the annual reports of the mandates and advise the Council concerning the mandates; this became the Permanent Mandates Commission. Finally, Paragraph (8) provided that:

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously [*i.e.*, before the effective date of the Covenant] agreed upon by the Members of the League, be explicitly defined in each case by the Council.

In May 1919, before the Treaty of Versailles was signed and the League came into existence, the Big Four<sup>26</sup> agreed to allot the former

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<sup>21</sup> Covenant, art. 22, ¶ 4. The designations "A," "B," and "C" are not found in Article 22 but were used throughout the history of the League. SWA Cases 479 (Spender and Fitzmaurice, JJ., dissenting).

<sup>22</sup> Covenant, art. 22, ¶ 4.

<sup>23</sup> Covenant, art. 22, ¶ 5.

<sup>24</sup> *Ibid.*

<sup>25</sup> Covenant, art. 22, ¶ 6.

<sup>26</sup> The United States, Great Britain, France, and Italy. The United States eventually withdrew from participation after President Wilson's domestic political defeat, and Japan was admitted to the "inner circle." Technically, the term "Principal Allied and Associated Powers" included the United States, and other terminology should be used to refer to the victors excluding the United States. In the SWA Cases, however, the presence or absence of the United States was not a relevant consideration; therefore this article does not attempt any rigorous distinctions between the various groupings of victorious "Allies."

enemy territories, as mandates, to the countries which occupied them; South Africa, on whose behalf action was taken by "His Britannic Majesty," eagerly accepted.<sup>27</sup> At the end of June, Germany signed the Treaty of Versailles, thereby formally ceding its colonies to the Allies.<sup>28</sup>

During the summer of 1919 drafts of proposed mandate agreements were considered by a committee of the Great Powers. An American draft first proposed that any dispute "between the Members of the League of Nations relating to the interpretation or application of" the mandate agreement should, if it could not be resolved by negotiation, be referred to the Permanent Court of International Justice; the same draft would also have permitted citizens of League members to go to the court for redress of violations of the rights guaranteed to them under the agreement.<sup>29</sup> The latter proposal was amended to deny individuals access to the court but to permit a member state to take up such a case on behalf of its national; the former was approved without reservation by the committee and by the chief Allied representatives.<sup>30</sup> By the end of December 1919, agreement had been reached by the Allies on all terms of the "C" mandates except an "open door" provision relating to certain islands allotted to Japan; the provision for reference of disputes to the Permanent Court was not questioned.<sup>31</sup>

The Japanese reservation continued to hold up final agreement on the "C" mandates when the Versailles Treaty, of which the League Covenant was part, came into effect (after rejection by the American Senate) in January 1920.<sup>32</sup> Finally, in December 1920, the proposed mandate for South West Africa, recast in the form of a Council resolution rather than a convention, was submitted to the Council of the League for its approval.<sup>33</sup> The experts of the League Secretariat added a fourth preambular paragraph, indicating that the proposed mandate provisions were established by the Council acting in accordance with Article 22 of the Covenant. They also slightly modified Article 7 of the mandate, which provided for reference of disputes to the Permanent Court, by

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<sup>27</sup> SWA Cases 350 (separate opinion of Bustamante, J.), 387 (separate opinion of Jessup, J.).

<sup>28</sup> *Id.* at 349 (separate opinion of Bustamante, J.).

<sup>29</sup> *Id.* at 387 (separate opinion of Jessup, J.), 393-94, 485 (Spender and Fitzmaurice, JJ., dissenting), 554.

<sup>30</sup> *Id.* at 388-89 (separate opinion of Jessup, J.), 555-58 (Spender and Fitzmaurice, JJ., dissenting).

<sup>31</sup> *Id.* at 389-90 (separate opinion of Jessup, J.).

<sup>32</sup> *Id.* at 390 (separate opinion of Jessup, J.). Judges Spender and Fitzmaurice contended that between the effective date of the Versailles Treaty and December 17, 1920, when the mandate for South West Africa was adopted by the Council of the League, the Union administered South West Africa as a mandate on a "quasi-anticipatory basis." *Id.* at 483.

<sup>33</sup> *Id.* at 393-94 (separate opinion of Jessup, J.), 485 (Spender and Fitzmaurice, JJ., dissenting).

rewording the crucial second paragraph so that only the mandatory was liable to be taken before the court by another Member of the League in the case of an unsettled dispute concerning the mandate.<sup>34</sup>

The preamble of the *mandate agreement* (or "declaration"),<sup>35</sup> as adopted by the Council on December 17, 1920, recited that Germany had renounced its rights in South West Africa to the Allies; that the Allies had "in accordance with Article 22 [of the] . . . Covenant" agreed that the mandate should be conferred on His Britannic Majesty "to be exercised on his behalf by the Government of the Union of South Africa"; that the Union "had agreed to accept the Mandate [and] . . . to exercise it on behalf of the League of Nations in accordance with the following provisions"; and that the Council was empowered by Article 22 to define the terms of the mandate, wherefore, the Council, "Confirming the said Mandate, defines its terms as follows . . ."

After an article defining the territory subject to the mandate,<sup>36</sup> Article 2 spelled out in general terms the Union's authority and obligations:

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.

The three following articles elaborated on the then current concepts of moral well-being and social progress by prohibiting slave trade, forced labor, arms traffic, and the supply of intoxicating beverages to the Africans and by forbidding military training of Africans or the establishment of military bases or fortifications in the territory; positively, the mandatory was required to ensure freedom of religion and to permit missionaries nationals of any League member to enter and travel freely in the area in the prosecution of their calling.

The last two articles provided assurances for the proper conduct of the mandatory. Article 6 required annual reports "to the satisfaction of the Council." The first paragraph of Article 7 required the consent of the Council "for any modification of the terms of the present Mandate." But it was the second paragraph which provided the means for the current attack upon South Africa's stewardship:

<sup>34</sup> Id. at 394, 396-97 (separate opinion of Jessup, J.), 453 (Winiarski, President, dissenting).

<sup>35</sup> The South West Africa mandate is set out in full in the dissenting opinions of Judges Spender and Fitzmaurice (id. at 487-88) and of Judge van Wyk (id. at 594-96).

As to various uses of the word "mandate," see note 114 *infra*.

<sup>36</sup> Mandate, art. 1.



The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The final paragraph of Article 7 provided for deposit of the declaration in the League's archives and for the forwarding of certified copies to all nations which signed the peace treaty with Germany.

In the twenty years that followed, Union administration of South West Africa was severely questioned several times in the Permanent Mandates Commission.<sup>37</sup> But since the Council of the League (composed of representatives of the Principal Allies as permanent members and representatives of nine other countries elected by the Assembly for short terms,<sup>38</sup> with the Union's representative joining when his country's interests were at issue)<sup>39</sup> acted only by unanimous agreement,<sup>40</sup> the Union did not suffer any serious censure. The Union gave up annual reporting when the Second World War paralyzed the League.<sup>41</sup>

#### *End of the League: Trusteeship (?)*

At the close of the War the moribund League was not revitalized. Instead, the San Francisco conference of 1945 created a new organization, the United Nations, which would, it was hoped, succeed (and be ratified by the American Senate) where the League had failed. It did away with the unanimity rule of the League: the U.N. General Assembly votes by either a simple or by a two-thirds majority, depending on the issue;<sup>42</sup> the Security Council requires only seven of eleven votes for action, with a right of veto accorded each of the five permanent members.<sup>43</sup>

The U.N. Charter did not provide for continuation of the mandates.

<sup>37</sup> Kerno 39-51; First 169-74.

<sup>38</sup> Covenant, art. 4, ¶ 1, as amended, Sept. 25, 1922, and Sept. 8, 1926; Académie Diplomatique Internationale, 2 Dictionnaire Diplomatique 761 & nn. a-c.

<sup>39</sup> Covenant, art. 4, ¶ 5.

<sup>40</sup> Covenant, art. 5, ¶ 1.

<sup>41</sup> SWA Cases 631, 633 (van Wyk, J., dissenting).

<sup>42</sup> Charter, art. 18, ¶¶ 2-3. Under the second paragraph, "important questions," which shall be decided by a two-thirds vote, include:

[R]ecommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council . . . the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions. Paragraph (3) provides that decision of "other questions, including the determination of additional categories of questions to be decided by a two-thirds majority," shall be by a simple majority of the members present and voting.

<sup>43</sup> Charter, art. 27, ¶ 3. Paragraph (2) requires a simple affirmative vote of seven members on "procedural matters." In certain cases a party to a dispute is not entitled to vote. Charter, art. 27, ¶ 3.

In their place, however, Article 76<sup>44</sup> established a very similar system of *trusteeship* "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence . . . ." According to Article 77 the system was designed to apply, *inter alia*, to "territories now held under mandate" and to territories taken from the losers in the Second World War. "It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms."<sup>45</sup> A saving clause was added by Article 80(1), that:

[U]ntil such [trusteeship] agreements have been concluded, nothing in this Chapter [on trusteeship] shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

During the San Francisco conference the South African delegate had advised his confrères that his government felt that the South West Africa mandate should be terminated and the territory incorporated in the Union.<sup>46</sup> At the first session of the U.N. General Assembly the South African representative in the Fourth (Trusteeship) Committee stated the Union's position that the Charter did not require that mandates be put under trusteeship; and he reiterated his government's desire to end its mandate, in view of the advanced self-government enjoyed by South West Africa and of a resolution by the territorial legislature asking to join the Union.<sup>47</sup> He added that approval of both whites and nonwhites would be sought before any agreements were drawn and that his government's decision "could be submitted to the General Assembly for judgment."<sup>48</sup>

A little later, in April 1946, members of the League met to dissolve their organization. In the closing sessions representatives of the mandates delivered their valedictories. The Union representative, after announcing that his government would press in the next U.N. General Assembly session for incorporation of South West Africa, continued:

In the meantime, the Union will continue to administer the territory

<sup>44</sup> The trusteeship system is created by Chapter XII, containing Articles 75-85. Chapter XIII (Articles 86-91) establishes and defines the powers and duties of the Trusteeship Council, the chief organ for administering the trusteeship system. For some differences between the trusteeship system and the mandates system, see text accompanying notes 50-56, 197-203, 211-15 *infra*.

<sup>45</sup> Charter, art. 77, ¶ 2.

<sup>46</sup> SWA Cases 533 (Spender and Fitzmaurice, JJ., dissenting), 537 (Spender and Fitzmaurice, JJ., dissenting), 616-18 (van Wyk, J., dissenting); Kerno 66.

<sup>47</sup> SWA Cases 538 (Spender and Fitzmaurice, JJ., dissenting), 623 (van Wyk, J., dissenting), 624 (van Wyk, J., dissenting).

<sup>48</sup> *Id.* at 624.

scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates . . . will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until . . . other arrangements are agreed upon concerning the future status of the territory.<sup>49</sup>

One of the final resolutions of the League Assembly, before its dissolution that spring, took note of:

[T]he expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers.<sup>50</sup>

And within a relatively short time all the mandated territories except South West Africa either became independent or were brought under the trusteeship system.<sup>51</sup>

The Union, however, took an increasingly intransigent position in the face of not merely the General Assembly's refusal to permit annexation, but also growing criticism by the Trusteeship Council of the conditions of nonwhites in South West Africa.<sup>52</sup> (The Council served much the same function as the League's Permanent Mandates Commission, but it was composed of representatives of U.N. members rather than technical experts of the Secretariat.<sup>53</sup>) In 1949, the Nationalist government stopped the reports on South West Africa which had previously been sent (as a courtesy and not out of any sense of legal obligation, it was asserted) to the Trusteeship Council.<sup>54</sup> At about the same time it was announced that the Union had revamped the territorial legislature and provided for representation of South West Africa in the South African Parliament<sup>55</sup>—annexation in fact, if not in legal form, it was charged in the General Assembly.<sup>56</sup> The Assembly's Fourth Committee thereupon

<sup>49</sup> Id. at 339-40 (opinion of the court), 417-18 (separate opinion of Jessup, J.), 628-29 (van Wyk, J., dissenting).

<sup>50</sup> Id. at 340 (opinion of the court), 418 (separate opinion of Jessup, J.), 538 n.1 (Spender and Fitzmaurice, J.J., dissenting), 627 (van Wyk, J., dissenting); Kerns 5-6, 8-10.

<sup>51</sup> Id. at 5-6, 10, 79 & n.1, 80. The future of Palestine was determined only after several years of wrangling at the U.N. and bloodshed on the spot.

<sup>52</sup> Id. at 17-18, 21.

<sup>53</sup> Charter, arts. 86-87.

<sup>54</sup> Kerns 21-22.

<sup>55</sup> Id. at 22. South West Africa is represented by six seats in the House of the Assembly.

<sup>56</sup> Kerns 19-20.

took the then extraordinary step of granting an oral hearing to the Reverend Michael Scott, an Anglican clergyman accredited by the Herero chiefs, who was the only available first-hand witness on conditions in the territory; and the Union delegate walked out of committee hearings on South West Africa.<sup>57</sup>

Disturbed by the accumulating evidence before it and frustrated by the Union's attitude and actions, the General Assembly resolved to request an advisory opinion from the International Court on the legal status of South West Africa.<sup>58</sup> Thus the curtain rose on the legal drama of South West Africa in the International Court.

### ACT I—THE ADVISORY OPINIONS

The request for an advisory opinion, filed at the end of 1949, posed a series of specific questions, all, in effect, varied aspects of the key question concerning the exact legal status of South West Africa.<sup>59</sup> The following July the court handed down a four part opinion:<sup>60</sup> on the general question of the territory's status, it held unanimously that "South-West Africa was a territory under the international Mandate assumed by the Union of South Africa on December 17th, 1920 . . . ."<sup>61</sup> By a vote of twelve-two the court went on to say:

[T]he Union . . . continues to have the international obligations stated in Article 22 of the Covenant . . . and in the Mandate . . . as well as the obligation to transmit petitions . . . the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court . . . to be replaced by a reference to the International Court of Justice.<sup>62</sup>

Thirdly, all the judges agreed that the trusteeship provisions of the Charter were available for South West Africa,<sup>63</sup> but by eight-six the court held that these provisions "do not impose on the Union of South

<sup>57</sup> *Id.* at 24-25. About half of Scott's autobiography, *A Time to Speak* (1958), is devoted to South Africa and South West Africa and Scott's lonely struggle in the U.N. on behalf of the nonwhites of these areas.

<sup>58</sup> *Kerno* 25-28.

<sup>59</sup> What is the international status of . . . South West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:

(a) Does the Union . . . continue to have international obligations under the Mandate . . . and, if so, what are those obligations?

(b) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to . . . South West Africa?

(c) Has the Union . . . competence to modify the international status of . . . South West Africa, or, in the event of a negative reply, where does competence rest . . . ?  
SWA Status 129.

<sup>60</sup> SWA Status. For comments on the decision, see Lauterpacht, *The Development of International Law by the International Court* 181-82, 291-92 (1958); Hudson, "The Twenty-Ninth Year of the World Court," 1 *Amer. J. Int. L.* 11-19 (1951).

<sup>61</sup> SWA Status 143.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Id.* at 144.

Africa a legal obligation to place the Territory under the Trusteeship System . . . ."<sup>64</sup> Finally, and again unanimously, the court held that the Union was not competent unilaterally to modify the "international status" of South West Africa, but that such competence "rest[ed] with the Union of South Africa, acting with the consent of the United Nations."<sup>65</sup> Five judges wrote separate opinions concurring in part and dissenting in part.<sup>66</sup>

Although members of the Assembly had hoped that the court's pronouncement would clarify the problem for the doubtful and thereby help bring about an agreement on South West Africa, no such result followed. Negotiations between an *ad hoc* committee of the Assembly and representatives of the Union were fruitless.<sup>67</sup> (During this period the new Boer-dominated government was intensifying every facet of segregation within the Union and beginning a campaign to suppress all opposition to its policies.<sup>68</sup>) In 1953 the Assembly established a Committee on South West Africa to exercise, in relation to that territory only, the functions formerly performed by the Permanent Mandates Commission (examining information, reports, and petitions, reporting to the Assembly on conditions in the territory, and preparing for the Assembly's consideration procedures for its examination of reports and petitions), using procedures as far as possible analogous to those of the Commission.<sup>69</sup>

An issue arose as to the propriety of a proposed rule of procedure governing General Assembly decisions on the way in which reports and petitions were to be made.<sup>70</sup> The proposal was that the Assembly should follow the procedure set out in Article 18(2) of the Charter, requiring a two-thirds majority.<sup>71</sup> But a passage in the 1950 advisory opinion, which summarized the court's conclusions on the obligations of the Union, stated:

The degree of supervision to be exercised by the General Assembly [in regard to the South West Africa mandate] should not . . . exceed that

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Id.* at 146 (separate opinion of McNair, J.), 164 (separate opinion of Read, J.), 174 (Alvarez, J., dissenting), 186 (de Visscher, J., dissenting), 191 (Krylov, J., dissenting).

<sup>67</sup> SWA Comm. 7-11 (A/1901) (1952); see *id.* at (A/2066), *id.* at Corr. 1.

<sup>68</sup> The Nationalist Party came to power in 1948. For a detailed study of South African politics of the period, see Carter, *The Politics of Inequality* (rev. ed. 1959) (especially chs. 1-4). For an analysis of the legal techniques of suppressing the opposition, see Landis, "South African Apartheid Legislation II," 71 *Yale L.J.* 437, 467-99 (1962).

<sup>69</sup> South-West Africa—Voting Procedure, [1955] *I.C.J. Rep.* 67, 71 (advisory opinion) [hereinafter cited SWA Voting]; Admissibility of Hearings of Petitioners by the Comm. on South West Africa, [1956] *I.C.J. Rep.* 23, 25 (advisory opinion) [hereinafter cited SWA Petitioners].

<sup>70</sup> This question was raised by representatives of the Union in the General Assembly and its committees. SWA Voting 74.

<sup>71</sup> See note 42 *supra*.

which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League . . . .<sup>72</sup>

And in the Council of the League decisions had to be unanimous.<sup>73</sup> The General Assembly therefore asked the court to pass on its voting procedure, and, if it was not proper, to inform it what procedure should be followed.<sup>74</sup>

Holding that the Assembly receives its competence from the Charter and that it is within the Charter that the Assembly must find the rules governing its procedure, the court unanimously held the proposed rule appropriate:

It would be legally impossible for the General Assembly, on the one hand, to rely on the Charter in receiving and examining reports and petitions concerning South-West Africa, and, on the other hand, to reach decisions relating to these reports and petitions in accordance with a voting system entirely alien to that prescribed by the Charter.<sup>75</sup>

The court stated that the "degree of supervision," which was not to exceed that under the Mandates System, did not relate to the system of voting, a procedural matter.<sup>76</sup> And its first opinion had implicitly recognized that procedures could not be entirely identical: "Consequently, the expression 'as far as possible' was designed to allow for adjustments and modifications necessitated by legal or practical considerations."<sup>77</sup>

Within a year the General Assembly again sought the court's advice, this time concerning the hearing of petitioners from the territory. During the lifetime of the League, the Council had never granted permission to the Permanent Mandates Commission to hear petitioners orally although it had made clear that the power existed and might be granted in extraordinary circumstances.<sup>78</sup> If a written petition was received directly from an inhabitant, he was instructed to submit it to the mandatory power, which would transmit it to the Commission with its comments.<sup>79</sup> When

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<sup>72</sup> SWA Status 138.

<sup>73</sup> See text accompanying note 40 *supra*.

<sup>74</sup> (a) Is the following Rule on the voting procedure to be followed by the General Assembly a correct interpretation of the Advisory Opinion . . . of 11 July 1950:

"Decisions of the General Assembly on questions relating to reports and petitions concerning . . . South West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter . . . ?"

(b) If this interpretation . . . is not correct, what voting procedure should be followed . . . ?

SWA Voting 75.

<sup>75</sup> SWA Voting 76.

<sup>76</sup> *Id.* at 74.

<sup>77</sup> *Id.* at 77.

<sup>78</sup> SWA Petitioners 28-29. But Commission members did have "private" interviews with petitioners on occasion. *Id.* at 42 (separate opinion of Lauterpacht, J.).

<sup>79</sup> *Id.* at 50.

South Africa refused to cooperate further with the U.N. after the War, the Committee on South West Africa had to devise an alternative procedure since the Union would no longer forward petitions. It directed petitioners to send their petitions to the South African government; but if the government failed to transmit them within two months, the Committee considered the originals validly received, studied them, and made such reports thereon as seemed appropriate on the basis of its own growing documentation and expertise.<sup>80</sup> However, with the first appearance of South West Africans in New York asking to be heard in person, the question became whether the Assembly might sanction such a departure from League practice—again in view of the passage in the 1950 opinion that U.N. supervision should not exceed that exercised by the League and that the same procedures should be followed as far as possible.<sup>81</sup>

By a vote of eight-five the court held that the Committee might properly grant oral hearings to petitioners.<sup>82</sup> Despite the abstract form of the question framed by the Assembly,<sup>83</sup> the judges clearly were influenced by the "practical considerations arising out of the lack of co-operation by the Mandatory."<sup>84</sup> Indeed, in one passage the court stated that, in view of the Union's failure to comment on petitions, oral hearings would make it possible for the Committee better to judge the merits of the petitions—and it certainly could not increase the burden of the mandatory to have the petitions subject to the most searching scrutiny before report thereon was made to the Assembly!<sup>85</sup> In a concurring opinion Sir Hersch Lauterpacht scouted the validity of this argument;<sup>86</sup> but he, too, reacted strongly to the anomalous legal situation in which South Africa refused to act on an Advisory Opinion which it was not legally bound to follow, but which formed the basis for subsequent protest against the granting of oral hearings.<sup>87</sup>

The most immediate and, probably, unexpected consequence of the 1956 opinion was to open Committee hearings to a flood of South West African "refugees," who suddenly began to flee their homeland in defiance of the most stringent Union regulations. The Reverend Michael Scott, who for years had singlehandedly carried the burden of petitions and lobbying at the U.N., was joined first by a handful, then by scores, of

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<sup>80</sup> *Id.* at 31 (opinion of the court), 50-51 (separate opinion of Lauterpacht, J.).

<sup>81</sup> SWA Status 138.

<sup>82</sup> SWA Petitioners 32.

<sup>83</sup> *Id.* at 24: "Is it consistent with the advisory opinion of . . . 11 July 1950 for the Committee on South West Africa . . . to grant oral hearings to petitioners on matters relating to the Territory of South West Africa?"

<sup>84</sup> SWA Petitioners 31.

<sup>85</sup> *Id.* at 30.

<sup>86</sup> *Id.* at 41 (separate opinion of Lauterpacht, J.).

<sup>87</sup> *Id.* at 47.

Africans, many with personal tragedy to relate, all with tribal oppression to protest and document.<sup>88</sup> But the increasingly aroused Assembly could not move the Union to change its policy in South West Africa, and repeated attempts of *ad hoc* committees to find some acceptable solution came to naught.<sup>89</sup> The time had come for some new and drastic approach to the problem.

#### ACT II—CONTENTIOUS PROCEEDINGS

For years a handful of interested persons had been intrigued by the possibilities of Article 7(2) of the mandate, the so-called "compulsory jurisdiction clause,"<sup>90</sup> by which the Union had "agreed" that unresolved disputes with any League member concerning the mandate should be submitted to the Permanent Court of International Justice. Although neither the League nor the Permanent Court still existed, it was felt that the International Court of Justice had succeeded, by virtue of Article 37 of its statute,<sup>91</sup> to the jurisdiction of the Permanent Court under the mandate. Under this theory it only remained to find, from among the countries which so vehemently protested conditions in South West Africa, a former member of the League willing to undertake such a proceeding before the international tribunal. In practice only Ethiopia and Liberia seemed legally qualified and willing to proceed; a nice legal question arose whether other independent African States, former colonies of Britain and France, both League members, had succeeded to the status of the mother countries, but it seemed that argument on such a tenuous point might distract the court from the substantive issues.<sup>92</sup> Finally in 1959 the General Assembly, acting on a special report on legal action available to enforce mandate obligations against South Africa,<sup>93</sup> "invited" legally qualified states to proceed against the Union in the International Court.<sup>94</sup> Late in 1960 representatives of Ethiopia and Liberia filed their complaints ("applications") with the court.

<sup>88</sup> Among the earliest: Mburumba Kerina; Jariretundu Kozonguizi; Hans Beukes (whose dramatic escape is chronicled in Lowenstein, *Brutal Mandate* ch. III (1962)); Rev. Markus Kooper; Sam Nujoma; Ismail Fortune; Jacob Kulungwa.

<sup>89</sup> These attempts are recited in the annual reports of the South West Africa Committee. See, e.g., 1962 (A/5212); 1960 (A/4464) annex II; 1955 (A/2913); 1953 (A/2261, A/2475); 1951-1952 (A/1901).

<sup>90</sup> Also called the "compromissory clause" or "adjudication clause." Quoted in text prior to note 37. *supra*.

<sup>91</sup> Quoted in text at note 108 *infra*.

<sup>92</sup> Conversations With African Representatives at the U.N.

<sup>93</sup> U.N. Gen. Ass. Off. Rec. 12th Sess., SWA Comm. Special Report, Supp. No. 12A (A/3625) (1957).

<sup>94</sup> U.N. Gen. Ass. Res. 1361, 14th Sess. (17 Nov. 1959). Its key provision drew: [T]he attention of Member States to the conclusions of the special report of the Committee on South West Africa covering the legal action open to Member States to refer any dispute with the Union of South Africa concerning the . . . Mandate . . . to the International Court . . . in accordance with Article 7 of the Mandate read in conjunction with Article 37 of the Statute of the Court.



*Complaint and Answer*

The "submissions" of the two applicants asked the court, first, substantially to confirm its 1950 opinion by finding that South West Africa is a territory under mandate, that the mandate is a treaty within the meaning of Article 37 of the court's statute, that South Africa remains subject to the obligations set forth in Article 22 of the Covenant of the League and in the mandate, and that the U.N. is legally qualified to exercise the supervisory functions of the League in relation to the administration of the mandated territory.<sup>95</sup> Further, the court was asked to find that the Union had violated its obligations, both general and specific, by, *inter alia*, failing generally to promote the material and moral well-being and social progress of the inhabitants of the territory; by introducing the doctrine and practice of apartheid (racial discrimination) in South West Africa; by substantially modifying the terms of the mandate without the consent of the U.N.; by refusing to render reports and transmit petitions to the U.N.; and by establishing military bases in the mandate.<sup>96</sup>

The response of the South African government was directed to the jurisdiction of the court, not to the merits of the case. It alleged that the governments of Ethiopia and Liberia had no *locus standi* in the proceedings and the court no jurisdiction because:

*Firstly*, by reason of the dissolution of the League of Nations, the Mandate for South West Africa is no longer a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court . . .

(a) with respect to the said Mandate Agreement as a whole . . .

(b) in any event, with respect to Article 7 itself;

*Secondly*, neither . . . Government . . . is "another Member of the League of Nations", as required . . . by Article 7 . . .

*Thirdly*, the conflict or disagreement alleged by . . . Ethiopia and Liberia to exist between them and . . . the Republic of South Africa, is by reason of its nature and content not a "dispute" as envisaged in Article 7 of the Mandate . . . more particularly in that no material interests of . . . Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby;

*Fourthly*, the alleged conflict or disagreement is as regards its state of development not a "dispute" which "cannot be settled by negotiation" within the meaning of Article 7 . . . [Emphasis by the court.]<sup>97</sup>

(As a result of questions put to the parties by the judges, the first preliminary objection was amended to read that the mandate "*has never been*,

<sup>95</sup> SWA Cases 322. These requests are from paragraphs "A" and "B" of the applications. They are repeated in substantially equivalent form in paragraphs (1)-(2) of the applicants' memorials, quoted *id.* at 324.

<sup>96</sup> *Id.* at 323-25 (taken from the applications and memorials set out verbatim in the court's opinion).

<sup>97</sup> *Id.* at 326-27 quoting the oral submissions of the government of South Africa.

or at any rate is since the dissolution of the League . . . no longer, a 'treaty or convention in force . . . ' <sup>98</sup> Otherwise, argument was based on the objections as originally stated.<sup>99</sup>)

In accordance with its rules, the court suspended consideration of the merits of the complaint in order first to determine the jurisdictional issue.<sup>100</sup>

### *Preliminary Analysis*

Decision of the *Preliminary Objections* caused the court all the anguish which jurisdictional cases are likely to occasion.

Despite the disclaimers of the judges,<sup>101</sup> the spectre of South West Africa seemed to haunt the court, whether in the form of oppressed international orphans or of international busybodies prying into the private affairs of sovereign states. By alleging prima facie jurisdiction in the court, Ethiopia and Liberia had forced South Africa to take the generally unpopular position that the court was not competent to hear substantive issues charged with burning emotions. The disapproval of nearly the entire U.N. was so intense that the dissenting judges felt obliged to remind their more tenderminded brethren:

[T]he fact that, in present circumstances . . . technical or political control cannot in practice be exercised in respect of the Mandate . . . is not a ground for asking a Court of law to discharge a task which, in the final analysis, hardly appears to be a judicial one.<sup>102</sup>

More important, perhaps, to the dissenters was the burden of proof. The dissenters argued that it was the duty of the applicants to establish the jurisdiction of the court beyond any reasonable doubt;<sup>103</sup> instead of insisting that the plaintiffs meet and overcome this burden, the dissenters protested that the form of the applications and of the objections, as well as the court's initial approach, had strongly influenced the outcome:<sup>104</sup> "The Court has, in our opinion, only been able [to reject respondent's objections] . . . by adopting premises which . . . largely assume beforehand the correctness of the conclusions arrived at."<sup>105</sup> The wording of the court's opinion did, indeed, seem to present the objections of the respondent more or less neutrally, as points to be proved or disproved, rather than as barriers to be surmounted.

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<sup>98</sup> Id. at 327. Italics indicate the substantive changes in the submissions.

<sup>99</sup> Id. at 328.

<sup>100</sup> Id. at 322.

<sup>101</sup> Id. at 437 (separate opinion of Mbanefo, J.), 459-60 (Basdevant, J., dissenting), 466-67 (Spender and Fitzmaurice, JJ., dissenting).

<sup>102</sup> Id. at 467 (Spender and Fitzmaurice, JJ., dissenting).

<sup>103</sup> Id. at 348 (opinion of the court), 473-74 (Spender and Fitzmaurice, JJ., dissenting).

<sup>104</sup> Id. at 460 (Basdevant, J., dissenting).

<sup>105</sup> Id. at 465 (Spender and Fitzmaurice, JJ., dissenting).

In form the court's opinion followed the fourfold pattern of respondent's objections. So, to a considerable extent, did the longer opinions of the concurring judges. But by their very nature they presented alternative or even conflicting arguments supporting the court's conclusions. By contrast, the various dissenting judges tended to place their major emphasis on varying objections, so that their arguments seemed to be more generally complementary. Since, however, in all opinions arguments directed to one point often applied as well to others, it has frequently been necessary to disregard the rubrics and formal subdivisions created by the judges in order to relate their rationale to the point in issue.

In analyzing the opinions for this article, it is assumed that the four objections state only two fundamental jurisdictional issues: (1) is there any basis at all for bringing South Africa before the court (the substance of the first objection); and (2) if so, do the applicants meet the requirements for proceeding on such a basis (to which issue the other three objections are directed)?

(1) *Basis for Bringing South Africa Before the Court*

Dissenting Judges Spender and Fitzmaurice stressed repeatedly the fundamental principle that the Republic of South Africa, as a sovereign state, could be brought before the court only by its consent.<sup>106</sup> Since that consent obviously was not forthcoming at the time the proceedings were instituted, the applicants had the primary burden of establishing that consent had once been given and that it had not lapsed or been withdrawn. In substance their theory was: (a) that such consent had been given by Article 7 of the mandate, which was an international treaty; (b) that such mandate and article remained in force; and (c) that the International Court had jurisdiction to hear the proceedings brought under Article 7 by virtue of reading together Article 36(1) of the statute of the court, which defined its competence to extend to "treaties and conventions in force,"<sup>107</sup> and Article 37 of the statute, which provided:

Whenever a treaty or a convention in force provides for reference of a matter to . . . the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.<sup>108</sup>

The respondent contended that Article 37 did not *grant* jurisdiction to the court, but merely substituted:

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<sup>106</sup> Id. at 467, 473-74, 501-02, 545.

<sup>107</sup> Stat. Int'l Ct. Just. art. 36 reads: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in [the Charter of the United Nations or] treaties and conventions in force."

<sup>108</sup> Ethiopia, Liberia, and South Africa are all parties to the statute of the court under Charter, art. 93, ¶ 1 which reads: "All Members of the United Nations are ipso facto parties to the Statute of the International Court . . . ."

[T]he present Court for the former Permanent Court in all cases in which under a "treaty or convention in force", the Permanent Court *would have had* jurisdiction and would have been competent to hear and determine the case.<sup>109</sup> [Emphasis by the court.]

This being so, it claimed that there was no basis for its being brought before the court since: (a) the mandate never was a treaty; and (b) if the mandate had ever been a treaty, that treaty and all its obligations had been terminated finally and absolutely upon dissolution of the League.

Because Article 7 was the key provision of the mandate, both parties had to argue, at least as a subsidiary issue, whether it could or should be treated separately from the other provisions of the mandate. To the applicants it could be considered on its own as a valid treaty even if the mandate as a whole were not deemed in force; to the respondent it constituted a sort of "bastard accretion,"<sup>110</sup> an anomaly not to be held part of the basic treaty (if such the mandate was). (Respondent's additional argument, that in any case the article didn't mean what the applicants claimed it did, was directed primarily to the second jurisdictional issue: whether applicants met the requirements to bring a proceeding under its provisions.) Arguments referring to the "mandate" often were in fact primarily concerned with Article 7. In this analysis it does not seem generally worthwhile to distinguish between arguments referring to the mandate as a whole and those directed to Article 7 except when the judges themselves made that distinction.

*The Mandate Never Was a Treaty.* It appears from the record that the respondent did not place much emphasis on the contention that the mandate never was a treaty.<sup>111</sup> But the dissenting Commonwealth judges,<sup>112</sup> though considering the third objection basic,<sup>113</sup> elaborated at length on the amended first objection.

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<sup>109</sup> SWA Cases 469 (Spender and Fitzmaurice, JJ., dissenting).

<sup>110</sup> Id. at 373 (Judge Bustamante's characterization of the South African characterization of the article).

<sup>111</sup> The court quotes the respondent as follows:

[T]he alternative view might well be taken that in defining the terms of the Mandate, the Council was taking executive action . . . and was not entering into an agreement which would itself be a treaty . . . . This view, we put it no higher than a view that might be taken . . . .

Id. at 330 (opinion of the court).

<sup>112</sup> South Africa left the Commonwealth upon becoming a republic. The Commonwealth judges on the court included Spender (Australia) and Fitzmaurice (Great Britain), dissenting, and Mbanefo (Chief Justice, Eastern Region, Nigeria), ad hoc judge, concurring. Under the court's procedure, the applicants were jointly entitled to name one ad hoc judge and the respondent was entitled to choose one (van Wyk, Justice of the Appellate Division of the South African Supreme Court). Id. at 321-22.

<sup>113</sup> Having regard to the view we take on the third Preliminary Objection . . . much of the discussion on the first preliminary objection (as also the second) has for us a certain unreality, since these objections are hardly meaningful, and are in any event

Their attack was on the "character" of the mandate,<sup>114</sup> which they claimed was not that of a treaty, but of a "quasi-legislative act of the League Council, carried out in the exercise of a power given to it by the Covenant . . . ."<sup>115</sup> They started by pointing out that in form the South West Africa Mandate does not look like a treaty and that it is called a "declaration."<sup>116</sup> They emphasized that the original draft of the mandate, which had been in the form of a treaty, was deliberately recast as a resolution of the League Council. "[The mandate] was *not* intended to be a treaty, or the original intention would have been proceeded with . . . ."<sup>117</sup> Indeed, in their view, the Council demonstrated that the mandate was its own act rather than a treaty by modifying the draft presented to it by the Principal Powers, inserting a fourth preambular paragraph and rewording Article 7.<sup>118</sup> Further evidence was that the Council replaced the proposed final clause of the preamble, reading "[The Council] Hereby *approves* the terms of the Mandate as follows" by a new clause which read "[The Council] confirming the said Mandate, *defines* its terms as follows . . . ."<sup>119</sup> The mere fact, the judges added severely, that the preamble recited "certain antecedent consents" or that the mandate was created under authority of the League Covenant, which was itself a treaty, did not make the *mandate* a treaty.<sup>120</sup> Nor was the isolated phrase "the Mandatory agrees" any more significant in determining the nature of the whole document.<sup>121</sup>

Proceeding in their attack on the character of the mandate, the dissenters criticized the idea, attributed to the applicants and the court, that "any instrument creating international obligations has treaty character."<sup>122</sup> "In brief, the assumption that it suffices if an international ob-

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unnecessary, in the context of this case, if Article 7 does not relate to the conduct of the Mandate . . . .

Id. at 473. (Spender and Fitzmaurice, JJ., dissenting).

<sup>114</sup> Judge Jessup pointed out in his opinion that "the word 'Mandate' has been used in many different senses—to indicate an institution, an instrument, a treaty or agreement, a grant of authority and a territory." Id. at 401 (separate opinion of Jessup, J.). Judges Spender and Fitzmaurice clarified their position:

What we understand by the Mandate is not this piece of paper [deposited in the archives of the League on 17 December 1920], but the international act that gave rise to it, namely . . . the Resolution of the Council of the League of the same date.

. . . . [I]t is . . . essential to distinguish clearly between the Mandates System, and the individual Mandates . . . . The former (the System) was the creation of Article 22 of the Covenant . . . . The latter, the Mandates themselves, were not. Id. at 477-79 (Spender and Fitzmaurice, JJ., dissenting).

<sup>115</sup> Id. at 490; accord, id. at 460 (Basdevant, J., dissenting).

<sup>116</sup> Id. at 490, 499-500 (Spender and Fitzmaurice, JJ., dissenting).

<sup>117</sup> Id. at 484. [Emphasis by the court.]

<sup>118</sup> Id. at 489-90, 597 (van Wyk, J., dissenting).

<sup>119</sup> Id. at 489 (Spender and Fitzmaurice, JJ., dissenting). [Emphasis added.]

<sup>120</sup> Id. at 491.

<sup>121</sup> Id. at 478.

<sup>122</sup> Id. at 491.

ligation exists, is to beg the whole question at issue, and to assume what has to be demonstrated . . . ."<sup>123</sup> They noted that by contrast with Article 37 of the court statute, transferring jurisdiction in cases of a "treaty or convention in force," Article 80(1) of the U.N. Charter, which saves certain rights pending trusteeship, refers to rights arising out of "existing international instruments."<sup>124</sup> This difference in phraseology, by legal specialists who had a hand at both instruments, must have been significant; the judges suggested that the quoted phrase in Article 80(1) probably was intended to refer specifically to mandates.<sup>125</sup> In the same vein they noted that that part of an early Assembly resolution dealing with the transfer from the League of certain political functions, including the supervisory functions of the Council, was styled "treaties, international conventions, agreements and other instruments having a political character . . . ."<sup>126</sup> Had like phraseology, they added, "been used in Articles 36 and 37 [of the Court statute], no doubt would have existed that the Mandate was covered, whatever view might be taken as to the character of that act or instrument."<sup>127</sup>

The dissenting judges found still another stumbling block to holding the mandate a treaty: a treaty requires two(or more) parties to it.<sup>128</sup> But if the Union of South Africa was the "party of the first part" to a mandate agreement, with whom could it be said to have contracted? Hardly the League, for forty years ago it was assumed that such an international organization had no legal personality apart from that of its members.<sup>129</sup> Not the Principal Powers, for: (a) the preamble to the mandate limited their role to naming the mandatory and proposing the terms of the mandate; (b) this was inconsistent with the powers of the League Council (in which the Principal Powers formed only a minority while the United States was, of course, not represented at all<sup>130</sup>) to supervise the mandatory and to modify the mandate; and (c) this was inconsistent with the conduct of such states after World War II and with the court's 1950 opinion that the power to supervise the mandate now vested in the U.N. General Assembly.<sup>131</sup> Neither could it be said that the party of the second part was the individual members for: (a) this was inconsistent with the form of the mandate, the absence of separate signatures, ratifications, etc.; (b) this was inconsistent with the Council's modification of Article

<sup>123</sup> Id. at 477.

<sup>124</sup> Emphasis added. Article 80(1) is quoted in text prior to note 46 supra.

<sup>125</sup> SWA Cases 477 (Spender and Fitzmaurice, JJ., dissenting).

<sup>126</sup> Id. at 478. [Emphasis by the court.]

<sup>127</sup> Id. at 477.

<sup>128</sup> Id. at 475-76.

<sup>129</sup> Id. at 475 n.1.

<sup>130</sup> Id. at 497; see text accompanying note 38 supra.

<sup>131</sup> SWA Cases 496, 498-99 (Spender and Fitzmaurice, JJ., dissenting).

7 to make South Africa only subject to the compulsory jurisdiction of the Permanent Court in disputes affecting the mandate; and (c) evidence shows that nonmembers of the Council were not consulted as to the supervision of the mandate and were bound by Council action only through their membership in the League (as parties to the Covenant) and not as parties to the mandate.<sup>132</sup> If the party of the second part was held to be the members of the Council or of the League in their capacity as members, or possibly the League itself, then their respective capacity or existence ceased upon the dissolution of the League; and with such disappearance the alleged former treaty (lacking a second party) ceased to exist.<sup>133</sup>

Furthermore it was argued that any engagements undertaken in the mandate never were binding since the mandate had not been registered in accordance with the procedure required by Article 18 of the Covenant.<sup>134</sup> Moreover, the facts of nonregistration and of failure to have the mandates published in the League's *Treaty Series* were claimed to be evidence that the mandate was not considered a treaty.<sup>135</sup>

But even if the mandate as a whole were held to be a treaty, the dissenting judges argued that Article 7 could not properly be considered an integral part of such agreement.<sup>136</sup> Unlike other clauses of the mandate,

<sup>132</sup> Id. at 500-02; accord, id. at 594 (van Wyk, J., dissenting). Judges Spender and Fitzmaurice also claimed that the members of the League could not individually have been parties to the mandate because the fourth paragraph of the preamble recited that there was no agreement among the members: "it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council . . . ." Id. at 500-01. Judge Jessup answered that apparently the phrase "not having been previously agreed upon by the Members of the League" should have been set off by commas, to make it conditional in sense, as in the French version ("il est prévu que si le degré d'autorité . . . n'a pas fait l'objet d'une Convention antérieure entre les Membres de la Société") and in the Covenant, art. 22, ¶ 8 which the disputed paragraph paraphrases. Moreover, he added, the dissenting judges' interpretation was contrary both to the historical facts and to the recital of facts in paragraphs 2-3 of the preamble. SWA Cases 394-95 (separate opinion of Jessup, J.).

<sup>133</sup> Id. at 499 (Spender and Fitzmaurice, JJ., dissenting).

<sup>134</sup> Id. at 332 (opinion of the court), 493-94 (Spender and Fitzmaurice, JJ., dissenting). The key sentence of Article 18 provided: "No such [i.e., unregistered] treaty or international engagement shall be binding until so registered." The equivalent provision of the Charter is found in Article 102:

(1) Every treaty and every international agreement entered into by any Member of the United Nations . . . shall as soon as possible be registered with the Secretariat and published by it.

(2) No party to any such treaty or international agreement which has not been [so] registered . . . may invoke that treaty or agreement before any organ of the United Nations.

<sup>135</sup> SWA Cases 494 (Spender and Fitzmaurice, JJ., dissenting).

<sup>136</sup> Id. at 516-17, 640 (van Wyk, J., dissenting).

[T]here is in fact no principle of international law which requires that because an instrument or institution survives or continues in existence, it must necessarily do so with respect to all its parts on a completely non-severable basis. The position is quite the contrary . . .

Id. at 517 (Spender and Fitzmaurice, JJ., dissenting).

Article 7 did not incorporate provisions already stated generally in Article 22 of the Covenant; instead, if interpreted as the applicants urged, it created a wholly novel form of judicial supervision not contemplated in the Covenant.<sup>137</sup> Such an innovation was clearly *ultra vires*, for Article 22, para. 1 states that "securities for the performance of this trust [development of the peoples of the mandate] should be embodied in *this Covenant*"; and that, the judges concluded, obviously excluded other alleged "securities" found elsewhere.<sup>138</sup> In support of their reasoning, the judges pointed to the two key securities found in the Covenant: annual reporting by the mandatories, and administrative supervision (according to the dissenters, really "political" supervision: "the system . . . was intended to be worked by a process of discussion, negotiation, and of common understanding"<sup>139</sup>) by the League Council and its Permanent Mandates Commission.<sup>140</sup>

Nor was there any basis in the law of contracts, the dissenting judges added, for holding Article 7 in force on the grounds of "necessity." Necessity implies that "the instrument, institution or system it relates to *will not function without it* . . . . In general, provisions for adjudication have not been regarded as having this character in relation to the instruments they figure in."<sup>141</sup> After all, most instruments do not have adjudication clauses, including, they added, the trusteeship agreements of the U.N.<sup>142</sup> Judge Winiarski pointed out that in all the years of the League the "judicial security" of the mandates was used only once—to protect the commercial rights of a Greek national in Palestine.<sup>143</sup> Judges Spender and Fitzmaurice summed up their argument in two revealing paragraphs:

Looking at the matter . . . in the light of its history . . . it seems . . . clear that the Applicants . . . are seeking to apply a sort of principle of "hindsight" and . . . "subsequent necessity" quite unknown to international law. What has happened is that a provision . . . practically never used . . . is seen (because of Article 94 of the Charter) to have potentialities which it did not originally possess . . . . [I]t is only through Article 7 that any control can be achieved over the Mandatory.

<sup>137</sup> Id. at 452-53 (Winiarski, President, dissenting), 599-600 (van Wyk, J., dissenting), 607-08 (van Wyk, J., dissenting).

<sup>138</sup> Id. at 458 (Winiarski, President, dissenting), 480 (Spender and Fitzmaurice, JJ., dissenting), 522 (Spender and Fitzmaurice, JJ., dissenting), 599-600 (van Wyk, J., dissenting), 661 (van Wyk, J., dissenting). [Emphasis added.]

<sup>139</sup> Id. at 520 (Spender and Fitzmaurice, JJ., dissenting).

<sup>140</sup> Id. at 480. The provisions that the mandate was to be exercised "on behalf of the League" and that the "well-being and development" of its peoples formed "a sacred trust of civilization" were also securities of a sort.

<sup>141</sup> Id. at 519. [Emphasis by the court.]

<sup>142</sup> Id. at 522, 524, 601 (van Wyk, J., dissenting).

<sup>143</sup> Id. at 454 (Winiarski, President, dissenting). The exception involves the Mavromatis Palestine Concessions, P.C.I.J., ser. A, No. 5 (1925), No. 2 (1924). The Mavromatis case is also referred to id. at 352-53 (separate opinion of Bustamante, J.), 390-92 (separate opinion of Jessup, J.), 484-85 (Spender and Fitzmaurice, JJ., dissenting).



This . . . is not a valid *legal* argument. . . . Subsequent events may affect the *importance* of a provision: they cannot affect its intrinsic legal character . . . . [Emphasis by the court.]<sup>144</sup>

The judges appended one more relatively legalistic note: Article 7 could not stand on its own as a separate treaty for detached from the mandate as a whole it would be "meaningless" and could have "no real existence."<sup>145</sup> Moreover, in such form it would be merely a "unilateral declaration involving a unilateral assumption of obligation, since the Mandatory alone gave the undertaking."<sup>146</sup>

If the dissenting judges, despite disclaimers, emphasized a relatively restrictive approach (after all, they pointed out, since the mandates represented the first example in history of conquerors exercising self-restraint in victory for the benefit of mankind, their gesture should not be unreasonably enlarged by judicial construction<sup>147</sup>), the majority was able to blend technical points with broad moral and philosophical considerations.

The mandate, asserted the court, was not a unilateral act of the League Council.<sup>148</sup> Terminology was not important here, nor was the form—or formlessness—of the instrument.<sup>149</sup> Judge Jessup, in passing, took time to state that "define," as used by the Council in the last clause of the preamble of the mandate, meant merely "to make definite" by approving in substance the draft of the Principal Powers.<sup>150</sup>

While the entire majority agreed that the mandate was an international treaty,<sup>151</sup> they differed on the grounds for so holding. All, however, agreed that the South African government was barred by principles of estoppel from disclaiming the existence of a convention on which alone it could base its legal right to have assumed peacetime administration of South West Africa and to have continued such administration for forty years.<sup>152</sup> The court added that the provisions for depositing the mandate in the archives and for forwarding certified copies to all signatories of the Versailles Treaty indicated that it was intended and understood to be a

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<sup>144</sup> Id. at 521.

<sup>145</sup> Id. at 474, 478.

<sup>146</sup> Id. at 478.

<sup>147</sup> Id. at 482-83.

<sup>148</sup> Id. at 330 (opinion of the court).

<sup>149</sup> Id. at 331, 405 (separate opinion of Jessup, J.).

<sup>150</sup> Id. at 397.

<sup>151</sup> Id. at 330 (opinion of the court).

<sup>152</sup> If the law of estoppel has any meaning or application in international law the Respondent would be precluded from raising such an issue on the face of its own conduct during the past 40 years.

Id. at 440 (separate opinion of Mbanefo, J.); accord, id. at 372-73 (separate opinion of Bustamante, J.). Judge Bustamante pointed out that the South African representative submitted a copy of the mandate as an annex to the objections, calling it "the agreement." Id. at 373.

treaty;<sup>153</sup> and Judge Bustamante pointed out that the South African government had expressed no reservations on its receipt.<sup>154</sup>

The majority scouted equally the objection of invalidity *ab initio* based on failure to register the mandate as a treaty.<sup>155</sup> In addition, however, it was argued that the formal acts performed in connection with the mandate were substantially equivalent or, at any rate, equal in effect to registration under Article 18;<sup>156</sup> that the mandate was an internal agreement of an international organization rather than a treaty between states requiring registration;<sup>157</sup> that the true agreement was reached in 1919 before the Covenant and its registration requirement came into existence;<sup>158</sup> and (reminiscent of litigation involving registration requirements wherever they exist) that, since the purpose of Article 18 was to prevent "secret treaties," publication of League proceedings achieved the purpose equally well, whereas the strict interpretation of registration urged by the respondent would penalize those whom it was intended to protect.<sup>159</sup>

Judge Jessup met many of the dissenters' arguments head on. He started by challenging one of their fundamental premises:

The notion that there is a clear and ordinary meaning of the word "treaty" is a mirage. The fundamental question is whether a State has given a promise or undertaking from which flow international legal rights and duties.<sup>160</sup>

The entire mandate, he argued, was instinct with obligation<sup>161</sup>—obligations which the South African government had "voluntarily agreed to incur."<sup>162</sup> He found that the government had undertaken the following engagements: (a) duties owed by all mandatories to co-members of the League under Article 22 of the Covenant; (b) duties owed under agreements with the Principal Powers to exercise the allotted mandate according to the specified terms; (c) obligations under the third paragraph of the mandate to accept the mandated territory and the terms under which it was offered; (d) duties under the mandate as a whole to act in the spirit of the instrument; and (e) the obligation under Article 7 to submit to the jurisdiction of the court in disputes affecting the mandate.<sup>163</sup>

<sup>153</sup> Id. at 331-32 (opinion of the court).

<sup>154</sup> Id. at 373 (separate opinion of Bustamante, J.).

<sup>155</sup> Id. at 332 (opinion of the court), 420 (separate opinion of Jessup, J.).

<sup>156</sup> Id. at 332 (opinion of the court), 372 (separate opinion of Bustamante, J.), 421 (separate opinion of Jessup, J.).

<sup>157</sup> Id. at 360 (separate opinion of Bustamante, J.), 372 (separate opinion of Bustamante, J.).

<sup>158</sup> Id. at 332 (opinion of the court).

<sup>159</sup> Id. at 420 (separate opinion of Jessup, J.).

<sup>160</sup> Id. at 402.

<sup>161</sup> Id. at 398.

<sup>162</sup> Id. at 401. "[T]he obligations were certainly not imposed upon the Mandatory, which, under Article 22(2) of the Covenant, was a State 'willing to accept' them." Ibid.

<sup>163</sup> Id. at 398-401.

Judge Mbanefo contended more simply that the mandate was not an act of the Council, but a part of the Covenant itself (an "annex"), which had the same validity and binding force (and, presumably, parties) as the Covenant.<sup>164</sup> He noted that all the "C" mandates had the same terms and were established to implement Article 22.<sup>165</sup> Setting forth the mandate in a separate document instead of appending it to the Covenant, as had apparently been intended at first, did not affect its character, he claimed; and the recitation of the preamble *was* indeed significant as showing the interrelationships which linked all the engagements of the mandatory and the League members.<sup>166</sup>

The court, relying heavily on its 1950 advisory opinion,<sup>167</sup> held that the mandate was:

[A] special type of instrument composite in nature and instituting a novel . . . regime. It incorporates [various agreements between South Africa and the Principal Powers or the League Council] . . . It is an instrument having the character of a treaty or convention . . .<sup>168</sup>

Judge Bustamante elaborated on this line of approach, attempting to establish a new concept of mandate from which valid conclusions as to the jurisdiction of the court would naturally flow. He asserted that the mandate constituted a:

[L]egal institution incorporated in international legislation . . . . [A]n integral part of the Treaty of Versailles. . . . The system and the agreement operate as an inseparable whole whose elements, which are conditional one upon the other, form an organic unit.<sup>169</sup>

The concept of mandate, he noted, arose from the new post-World War I anticolonialist sentiment and concern for the rights of underdeveloped peoples, which led to a system of tutelage under advanced nations "on behalf of the League" in accordance with the "sacred trust" to promote the well-being and development of such peoples.<sup>170</sup> The concept of mandate should be interpreted in the light of this background, with an eye

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<sup>164</sup> Id. at 441 (separate opinion of Mbanefo, J.).

<sup>165</sup> Id. at 442.

<sup>166</sup> Id. at 441.

<sup>167</sup> SWA Status. However, Judges Spender and Fitzmaurice felt that:

[T]he Court in 1950 did little more than find, on various grounds, that the dissolution of the League . . . had not caused the Mandate to lapse, and that despite this dissolution, the Mandate was still in force. But the Court did not [consider] . . . the basis upon which the Mandate was in force nor . . . whether it was still in force as a treaty or convention . . . .

SWA Cases 472 (Spender and Fitzmaurice, JJ., dissenting). Judge Basdevant indicated that he found the court's theoretical approach in the present case (and, by implication, in the earlier one) insufficient. Id. at 463-64 (Basdevant, J., dissenting).

<sup>168</sup> Id. at 331 (opinion of the court).

<sup>169</sup> Id. at 356 (separate opinion of Bustamante, J.).

<sup>170</sup> Id. at 350-51.

to its similarities to the municipal law of trust, guardianship, and mandate.<sup>171</sup>

Judge Bustamante found a "contractual element" present in the mandate, noting that South Africa had already expressed acceptance of the mandate to the Great Powers before the League came into existence.<sup>172</sup> But he stressed that the mandate emphasizes responsibilities, not rights.

[T]he agreement does not . . . suppose any real balance between the obligations and the rights of the parties. The legal concept is nearer that of the unilateral contracts of private law . . . . The rights granted to the Mandatory are for . . . the better fulfilment of its obligations towards the country under tutelage. The concept of obligation predominates.<sup>173</sup>

In general, arguments as to the nature of the mandate impliedly included Article 7.<sup>174</sup> Since, however, the dissenters had contended that the article was separate and invalid, the majority replied directly to these contentions.

Judges Mbanefo and Bustamante felt that the Council, in accepting Article 7, was merely carrying out its duties under the Covenant to define the "degree of authority, control or administration to be exercised by the Mandatory,"<sup>175</sup> since in their view Article 7 limited the power of administration conferred on the mandatory.<sup>176</sup> Legally speaking, Article 7 was analogous to the "optional clause"<sup>177</sup> of the statute of the Permanent Court, ratified by the Union in 1921, by which it agreed in advance to accept the court's jurisdiction in certain instances.<sup>178</sup> Moreover, Article 7 was a "necessary security" for the mandate system: the unanimity rule of the League, which allowed states to vote in matters affecting their own interests, necessitated some decisive legal mechanism for settling

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<sup>171</sup> *Id.* at 352.

<sup>172</sup> *Id.* at 358.

<sup>173</sup> *Id.* at 357.

<sup>174</sup> It is "one of the major provisions of the Mandate system." *Id.* at 361.

<sup>175</sup> Covenant, art. 22, ¶ 8.

<sup>176</sup> SWA Cases 374 (separate opinion of Bustamante, J.), 442 (separate opinion of Mbanefo, J.).

<sup>177</sup> Stat. Int'l Ct. of Just., art. 36, ¶ 2. The article was in every relevant particular identical with the "optional clause," also Article 36 para. 2, of the statute of the present court, which reads:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact [constituting] . . . a breach of an international obligation;
- d. the nature or extent of the reparation . . . for the breach of an international obligation.

<sup>178</sup> SWA Cases 360 (separate opinion of Bustamante, J.); cf. Judge Bustamante's comment on the application to Article 7 of the Mandate of the rules governing the optional clause. *Id.* at 375.

deadlocks in matters concerning the mandates.<sup>179</sup> The court added that the two-thirds rule of the U.N. obviates the necessity for a compromisory clause in the trusteeship agreements.<sup>180</sup>

Judge Jessup, on the other hand, agreed with the dissenters that Article 7 was outside the scope of Article 22(8) of the Covenant.<sup>181</sup> To him, however, it had an even more solid separate contractual basis: it stemmed from the agreement between South Africa and the Principal Powers as to the terms on which the mandate was allotted—the mandate declaration merely “recorded” the agreement.<sup>182</sup> He contended that Article 7 constituted a contract for the benefit of “third-State beneficiaries” (the co-members of the League) as well as for the inhabitants of the mandates.<sup>183</sup>

*The Mandate Is No Longer in Force.* Even if the mandate were held to have been a treaty, respondent argued that it had, as a matter of law, lapsed upon dissolution of the League and that any obligations under it had not been continued or revived.

According to the dissenting judges, the only possible “parties of the second part” lost either their capacity or their existence with the demise of the League.<sup>184</sup> The judges warned that the mandate could not, therefore, possibly survive since the fundamental principle applicable to any such case is that:

[R]ights . . . vested in persons or entities in a specified capacity, or as members of a specified class, are not . . . vested in them in their . . . individual capacity, and therefore cease to be available . . . if they lose the specified capacity, or cease to be members of the indicated class . . . .<sup>185</sup>

<sup>179</sup> Id. at 336-37 (opinion of the court), 360 (separate opinion of Bustamante, J.), 374.

Under the unanimity rule . . . the Council could not impose its own view on the Mandatory . . . . [A]n advisory opinion of the Permanent Court . . . would not have binding force . . . . [N]either the Council nor the League was entitled to appear before the Court [in contentious proceedings]. The only effective recourse for protection of the sacred trust would be for a Member . . . of the League to invoke Article 7 and bring the dispute . . . to the Permanent Court for adjudication . . . . It is thus seen what an essential part Article 7 was intended to play as one of the securities in the Mandates System . . . .

Id. at 337 (opinion of the court).

<sup>180</sup> Id. at 342.

<sup>181</sup> Id. at 398 (separate opinion of Jessup, J.).

<sup>182</sup> Ibid.

<sup>183</sup> Id. at 409. He found acceptance (possibly necessary under this theory) in the Assembly's acceptance of the “C” mandates and in the “continuing conduct of both the Council and the Assembly with reference to the administration of the C Mandates,” although consent of the beneficiary might be presumed, as it may be in private law. Id. at 410.

International law, not being a formalistic system, holds States legally bound by their undertakings in a variety of circumstances and does not need either to insist or to deny that the beneficiaries are “parties” to the undertakings.

Id. at 411.

<sup>184</sup> Id. at 499 (Spender and Fitzmaurice, JJ., dissenting), 503 (Spender and Fitzmaurice, JJ., dissenting); text accompanying note 133 supra.

<sup>185</sup> SWA Cases 467-68.

More than the simple loss of the other party, however, dissolution of the League resulted in the absence of all international organs with any legal concern as to the mandates. The consequence was, the South Africans explained, that the obligations of the mandate which related to administrative (and, perforce, to judicial) supervision, being "contractual," necessarily became extinct on the dissolution of the League, while the rights and obligations of administration of South West Africa, being "objective," continued.<sup>186</sup>

Since the respondent and the dissenting judges considered the lapse of the mandate substantially self-evident, their primary concern was to show that the U.N. had not succeeded the League as to any international treaty obligations or revived them.<sup>187</sup> They drew their evidence largely from the Charter and from the records of the San Francisco Preparatory Conference (drafting the U.N. Charter), the early sessions of the U.N., and the closing meetings of the League of Nations.

The dissenting South African judge turned to the Charter. There was no provision anywhere in it, he stated, for continuing Article 7 of the mandate nor for substituting any organ of the U.N. for the League Council or the Permanent Mandates Commission;<sup>188</sup> by contrast, Article 37 of the annexed statute of the International Court specifically provides that the new court is substituted for the old.<sup>189</sup>

There can be no doubt that the parties to the Charter would have used positive terms had they intended that the provisions of the Mandates would be amended [to] . . . remain effective . . . until each territory was placed under the Trusteeship System; they would not have used language incapable of having this meaning.<sup>190</sup>

Moreover, he found it significant that Article 80(1) of the Charter, which safeguarded peoples, states, and "terms of existing international instruments" against alteration of rights occasioned by the institution of trusteeship, did not cover the case of alteration of rights arising from the dissolution of the League.<sup>191</sup> "The 'rights' of the peoples of South West Africa did not include the continued application of Articles 6 and 7 of the Mandate after the demise of the organization on which these articles depended for their fulfilment."<sup>192</sup>

To establish that the natural inferences from the Charter were correct, the dissenters then turned to the historical record, demonstrating first

<sup>186</sup> Id. at 332-33 (opinion of the court), 369 (separate opinion of Bustamante, J.), 527-29 (Spender and Fitzmaurice, JJ., dissenting).

<sup>187</sup> Id. at 635 (van Wyk, J., dissenting), 658 (van Wyk, J., dissenting).

<sup>188</sup> Id. at 612.

<sup>189</sup> Id. at 615.

<sup>190</sup> Id. at 647.

<sup>191</sup> Id. at 618.

<sup>192</sup> Id. at 646.

that the U.N. was not, from a "legal and historical point of view," the successor to the League however much it might be so considered in a "loose and general sense."<sup>193</sup> They pointed out that two of the five major postwar powers, Russia and the United States, were not members of the League at its dissolution and that both were opposed to making the U.N. "the League under a different name or an automatic successor in law. . . ."<sup>194</sup> The many complicated treaties between the U.N. and the League regarding its assets and functions were further evidence of the lack of automatic succession, as was the conduct of League members on the eve of its demise.<sup>195</sup> Nor is there any rule of law providing that:

[W]here an international organization comes to an end, and another . . . performing similar functions exists at that time, that the powers and functions of the dissolved organization pass automatically to the organs of the new organization . . . .<sup>196</sup>

As for the mandates system, it was even clearer to the dissenting judges that there was no direct or automatic succession to any U.N. organs. The dissenters pointed out that the delegates to the Preparatory Conference established the completely new, if substantially similar, trusteeship system<sup>197</sup> (as well as provisions for other "non-self-governing" territories<sup>198</sup>). As Article 77(1) of the Charter seemed to indicate,<sup>199</sup> and as the court advised in 1950,<sup>200</sup> there was no binding obligation to place mandated territories under trusteeship and no evidence whatsoever that the U.N. was to supervise mandates not placed under trusteeship.<sup>201</sup> The delegates deliberately drafted Chapters eleven to thirteen of the Charter without any such provisions despite statements by the Union representative that his country wanted to annex South West Africa and had no obligation or

<sup>193</sup> *Id.* at 611.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Id.* at 609, 611.

<sup>196</sup> *Id.* at 603.

<sup>197</sup> *Id.* at 532 (Spender and Fitzmaurice, JJ., dissenting), 612-13 (van Wyk, J., dissenting).

<sup>198</sup> Charter, ch. 11 ("Declaration Regarding Non-Self-Governing Territories"), comprising arts. 73-74. Judges Spender and Fitzmaurice argued (*id.* at 541-42) that "B" and "C" mandates not placed under trusteeship should automatically have been considered nonself-governing territories subject to Chapter 11. But this would have been equivalent to terminating the mandate and recognizing the annexation of South West Africa, for (a) the unvarnished term for "non-self-governing territory" is "colony" and (b) according to Judge van Wyk (*id.* at 634) the mandatory could not possibly be subjected simultaneously to two separate and possibly conflicting supervisory regimes.

<sup>199</sup> *Id.* at 613 (van Wyk, J., dissenting):

Article 77(1) . . . provides that the trusteeship system shall apply "to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: (a) territories now held under mandate . . . ." From this it is clear that there could not have been any contemplation that the Trusteeship System would automatically . . . apply to the territories held under mandate. Only trusteeship agreements could bring these territories under the Trusteeship System . . . .

<sup>200</sup> SWA Status 144.

<sup>201</sup> SWA Cases 612-13 (van Wyk, J., dissenting).

intention to place it under trusteeship and despite indications by other countries as well that automatic transfer of mandates to the trusteeship system was unlikely.<sup>202</sup>

Furthermore, the U.N. Preparatory Commission (set up after the Conference) rejected a proposal for a temporary Trusteeship Committee to advise the General Assembly on problems arising out of the transfer to the U.N. of functions and responsibilities exercised under the mandates system. Instead it recommended that the Assembly adopt a resolution urging states which administered mandates to propose trusteeship agreements at the forthcoming General Assembly.<sup>203</sup> Thus there was no basis for claiming that the U.N. succeeded the League under the mandate agreement. And in view of the substantial differences between the mandates and the trusteeship systems—particularly in the unanimity rule—there was no basis for assuming any new or revived obligations on the part of the Union to the U.N.<sup>204</sup>

The dissenting judges found confirmation of their conclusions in the early history of the U.N. A special committee on Palestine (an "A" mandate) reported in 1947 that in its opinion there was no supervisory authority as to the administration of the territory after the dissolution of the League.<sup>205</sup> And not until 1948 was there any suggestion in the U.N. that possibly some of its organs had been substituted for those of the League in relation to the mandates.<sup>206</sup>

Evidence from the final meetings of the League was, in their opinion, cumulative. The judges pointed out that the League rejected a proposed resolution which, in order to avoid a "period of interregnum," would have recommended that the U.N. take over supervision of the mandates on an interim basis until the Trusteeship Council was established. The substitute which passed merely noted that the mandatories had expressed their intention to administer their territories in accordance with their obligations until other arrangements were concluded with the U.N.<sup>207</sup>

As far as Article 7 was concerned, they asserted that it was never considered at Geneva.<sup>208</sup> Had any question of extending it or transferring

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<sup>202</sup> Id. at 533 (Spender and Fitzmaurice, JJ., dissenting), 536-37 (Spender and Fitzmaurice, JJ., dissenting), 616-18 (van Wyk, J., dissenting), 622-24 (van Wyk, J., dissenting).

<sup>203</sup> Id. at 536 (Spender and Fitzmaurice, JJ., dissenting).

<sup>204</sup> Id. at 610 (van Wyk, J., dissenting). Other differences not specifically referred to by the judges include the definition of the objective of trusteeship as "self-government or independence" (Art. 76(b)), compared with the vague "well-being and development" of Art. 22(1) of the Covenant; and the power of the Trusteeship Council to make periodic inspections of the trust territories (Art. 87(c)).

<sup>205</sup> SWA Cases 636.

<sup>206</sup> Id. at 636-37.

<sup>207</sup> Id. at 535 (Spender and Fitzmaurice, JJ., dissenting), 538 n.1 (Spender and Fitzmaurice, JJ., dissenting), 631-32 (van Wyk, J., dissenting).

<sup>208</sup> Id. at 544-45 (Spender and Fitzmaurice, JJ., dissenting).



jurisdiction under it to the new court been raised there, it certainly would have been voted down.<sup>209</sup> As to the South African mandate particularly, "we think the inherent probabilities are so obviously against it, as to place the matter virtually beyond discussion . . . ."<sup>210</sup>

The dissenting judges did feel obliged, however, to explain away two statements on which the majority placed great emphasis. The first was the Union representative's "assurance" to the League that his country would "continue to administer the territory scrupulously in accordance with the obligations of the Mandate . . . ."<sup>211</sup> This did not constitute an international agreement, Judges Spender and Fitzmaurice contended, for it was a mere unilateral declaration, not a compact.<sup>212</sup> Obviously, they added, the mandatory was simply referring to the actual process of administration and not to any other "collateral" obligations, particularly since the Union spokesman had noted that disappearance of various League organs would preclude "compliance with the letter of the Mandate."<sup>213</sup> This statement and the League resolution on mandates:

[C]annot be regarded as constituting binding undertakings to continue to apply all the provisions of the Mandate . . . irrespective of how [they] . . . would be affected by the dissolution of the League; and we are unable to . . . infer from them . . . the indefinite prolongation of a jurisdictional obligation about to lapse according to its terms . . . .<sup>214</sup>

The judges pointed out further that a renewal or revival of obligations (inferred from the "assurance") would have subjected South Africa in the future to considerably more onerous conditions, for the U.N. does not operate under the unanimity rule—and, Judge van Wyk asserted, it was only the "procedural provisions" of the Covenant which had ever persuaded Australia, New Zealand, and South Africa to subject their conquests to the international mandates regime.<sup>215</sup> Moreover, if renewed obligations under Article 7 were inferred (on the part of South Africa to other states, be it noted, but not of other states to South Africa<sup>216</sup>), the

<sup>209</sup> Id. at 530 (Spender and Fitzmaurice, JJ., dissenting), 634 (van Wyk, J., dissenting).

<sup>210</sup> Id. at 530 (Spender and Fitzmaurice, JJ., dissenting).

<sup>211</sup> See text accompanying note 49 *supra*.

<sup>212</sup> "Nor would a statement (e.g., of intention) made, or an assurance given, in the course of, say, a speech at an international conference or assembly, be a treaty or convention." SWA Cases 476 (Spender and Fitzmaurice, JJ., dissenting).

<sup>213</sup> Id. at 527 & n.1 (Spender and Fitzmaurice, JJ., dissenting). Judge van Wyk explained what his government had meant by the assurance as follows:

[Respondent's representative] said that the Respondent would continue to administer the territory "scrupulously in accordance with the obligations of the Mandate for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held". During this period referred to by the Respondent, Article 6 [annual reporting] was not applied. Nor was Article 7 invoked . . . .

Id. at 631 (van Wyk, J., dissenting).

<sup>214</sup> Id. at 529 (Spender and Fitzmaurice, JJ., dissenting).

<sup>215</sup> Id. at 600 (van Wyk, J., dissenting).

<sup>216</sup> Id. at 546 (Spender and Fitzmaurice, JJ., dissenting), 597 (van Wyk, J., dissenting).

new consequences would be even harsher, for the U.N. Charter has toothbuds unknown to the League: decisions of the International Court may be "enforced" by recourse to the U.N. Security Council.<sup>217</sup> These circumstances made it:

[Q]uite inconceivable that a State which was aiming at the incorporation of the Mandated territory in its own territory could possibly have been willing . . . simultaneously to perpetuate, possibly indefinitely, an obligation of compulsory jurisdiction . . . about to become inoperative.<sup>218</sup>

The changed consequences which would have resulted from such an inference necessitated strict construction of the "assurance."<sup>219</sup>

The second statement was the promise of the South African delegate in the Fourth (Trusteeship) Committee of the U.N. Assembly that after consultation with the white and nonwhite population of South West Africa concerning annexation, the decision of the Union "would be submitted to the General Assembly for judgment."<sup>220</sup> This offer, said the dissenters:

[C]annot be taken as an acknowledgement that the supervisory functions of the Council of the League had been transferred to the General Assembly. It was no more than a specific undertaking to ask the General Assembly for its judgment on this particular issue . . .<sup>221</sup>

In overruling respondent's contention as to the lapse of the mandate, the majority placed primary emphasis on legal and philosophical, rather than historical, arguments.

They found the South African thesis of continuing rights in the mandate without any corresponding obligations as distasteful morally and legally<sup>222</sup> as the contention that it had governed South West Africa since World War I on the basis of a nonexistent treaty.<sup>223</sup> The court had called the first argument unjustified in 1950,<sup>224</sup> and it was still of the same opinion.<sup>225</sup> The majority found reasons for holding both that the original obligations continued in force despite the dissolution of the League and that in any case they had been transferred to the U.N. or renewed.

Judge Jessup argued that the obligation of Article 7, at least, derived

<sup>217</sup> Id. at 546 (Spender and Fitzmaurice, J.J., dissenting). Charter, art. 94, ¶ 2 provides: If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [International] Court, the other party may have recourse to the Security Council, which may . . . make recommendations or decide upon measures to be taken to give effect to the judgment.

<sup>218</sup> SWA Cases 530.

<sup>219</sup> Id. at 511.

<sup>220</sup> See text accompanying note 48 *supra*.

<sup>221</sup> SWA Cases 624 (van Wyk, J., dissenting).

<sup>222</sup> Id. at 333-34 (separate opinion of Bustamante, J.), 416-17 (separate opinion of Jessup, J.), 443 (separate opinion of Mbanefo, J.).

<sup>223</sup> See text accompanying notes 152-59 *supra*.

<sup>224</sup> SWA Status 133.

<sup>225</sup> SWA Cases 371 (separate opinion of Bustamante, J.), 416-17 (separate opinion of Jessup, J.), 443-44 (separate opinion of Mbanefo, J.).

from the agreement between South Africa and the Principal Powers, was unaffected by the dissolution of the League.<sup>226</sup> The nature of the article, he had already suggested, was that of a "third-State beneficiary" contract.<sup>227</sup> Alternatively he suggested that Article 7 might be considered a continuing offer not yet withdrawn when Ethiopia and Liberia started their proceedings.<sup>228</sup> In any case he found that the dissolution of the League had not introduced any element of frustration or impossibility of performance by South Africa; so the mandate subsisted.<sup>229</sup>

To Judge Mbanefo the mandate was "a bundle of rights and obligations, not a physical edifice, although it has physical aspects . . . ."<sup>230</sup> These rights, including the right to invoke the court under Article 7, continued undisturbed since the purpose (development of the people of the mandated territory) "has not yet been achieved, and no one has suggested that it has been abandoned or rendered invalid with the dissolution of the League . . . ."<sup>231</sup>

The theories by which South Africa's obligations were renewed or transferred to the U.N. were more varied and numerous.

By reading Articles 92, 93(1), and 110(4) of the Charter<sup>232</sup> with Article 37 of the statute of the International Court, the court held that South Africa, as a member of the U.N., was a party to the statute of the court, to which disputes under valid treaties formerly referable to the Permanent Court were now to be taken.<sup>233</sup> Since South African ratification took place in 1945, when the League, the old court, and the mandate were all in existence, the obligations of the mandate were still effective, and their transfer to the new international bodies was, as of that time, voluntarily assumed by the Union.<sup>234</sup>

To sum up, the fact of the Republic of South Africa becoming a Member of the United Nations was the *legal link* which . . . established continuity between the two world organizations and between the two systems for the protection of the former German colonies. [Emphasis by the court.]<sup>235</sup>

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<sup>226</sup> See text accompanying note 182 *supra*.

<sup>227</sup> See text accompanying note 183 *supra*.

<sup>228</sup> SWA Cases 410 (separate opinion of Jessup, J.), 419 (separate opinion of Jessup, J.).

<sup>229</sup> *Id.* at 414.

<sup>230</sup> *Id.* at 444 (separate opinion of Mbanefo, J.).

<sup>231</sup> *Id.* at 445.

<sup>232</sup> Article 92 provides that the statute of the International Court, which is based upon the statute of the Permanent Court, "forms an integral part of the present Charter." Article 93(1) provides that U.N. members are ipso facto parties to the statute of the court. And article 110 (4) provides that states signatory to the Charter which ratify it after it comes into force become original members on the date of deposit of their respective ratifications.

<sup>233</sup> SWA Cases 334-35 (opinion of the court), 418 (separate opinion of Jessup, J.).

<sup>234</sup> *Id.* at 335 (opinion of the court).

<sup>235</sup> *Id.* at 370 (separate opinion of Bustamante, J.). Further, Judge Jessup pointed out: It would not be in accordance with the spirit and intent of Articles 36(5) and 37 [of the statute of the present court] to interpret them in such a way as to leave a gap through which would fall to the ground such an agreement as is recorded in Article 7 of the Mandate.

Moreover, Judge Bustamante added, when South Africa, in September 1955, accepted the so-called "optional clause" of the statute of the new court,<sup>236</sup> it confirmed the court's jurisdiction over disputes arising out of the chronologically earlier Article 7 of the mandate.<sup>237</sup>

The court then considered briefly the closing sessions of the League Assembly and found that:

[O]bviously an agreement was reached among all the Members . . . to continue the different Mandates as far as it was practically feasible . . . notwithstanding the dissolution of the League itself<sup>238</sup> [and that this agreement was unanimous<sup>239</sup>] . . . .

This agreement was evidenced by the dissolution resolution, the discussions, and "the whole set of surrounding circumstances."<sup>240</sup> And an important element, Judge Jessup insisted, was the South African "assurance" that the obligation of Article 7 would continue to exist for the benefit of the then members of the League.<sup>241</sup> "This was an undertaking of an international character by which the Union of South Africa assumed an international obligation . . . ."<sup>242</sup> He suggested an element of estoppel, noting the League's "reliance" on this and similar declarations.<sup>243</sup>

Judges Mbanefo and Bustamante added that South West Africa was still involved in what was properly a winding-up operation (in preparation for trusteeship<sup>244</sup>). During such transitional period the saving clause of Article 80(1) of the Charter preserved the mandate obligations.<sup>245</sup> Since Judge Bustamante felt, despite the court's 1950 opinion, that the Charter compelled the mandatories to place their mandates under the U.N. trusteeship system,<sup>246</sup> he pointed out carefully that despite a lack of "automatic succession" the Charter did provide "the necessary machinery" for continuance of the mandates.<sup>247</sup> Following the court's reasoning in part, he claimed:

Members of the United Nations, by virtue of their voluntary acceptance

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*Id.* at 415.

Article 36(5) provides that declarations made under the "optional clause" [Art. 36(2)] of the statute of the Permanent Court (see text accompanying notes 177-78 *supra*; note 177 *supra*) which are still in force "shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court . . . ."

<sup>236</sup> This is quoted in note 177 *supra*.

<sup>237</sup> SWA Cases 376 (separate opinion of Bustamante, J.).

<sup>238</sup> *Id.* at 338 (opinion of the court).

<sup>239</sup> *Id.* at 341.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Id.* at 419 (separate opinion of Jessup, J.).

<sup>242</sup> *Id.* at 418.

<sup>243</sup> *Ibid.*

<sup>244</sup> *Id.* at 383-84 (separate opinion of Bustamante, J.), 446 (separate opinion of Mbanefo, J.).

<sup>245</sup> *Id.* at 383-84 (separate opinion of Bustamante, J.).

<sup>246</sup> *Id.* at 383.

<sup>247</sup> *Id.* at 364.

... of the Charter, assumed all the obligations flowing therefrom, and, consequently ... a Mandatory ... at the same time freely accepted the obligation to renew or to transform the Mandate into a Trusteeship agreement. The negotiation of a new agreement is [not] ... imposed by force: it is a *pact* ... concluded ... when the Charter was signed by the Mandatory. [Emphasis by the court.]<sup>248</sup>

At any rate, Judge Bustamante argued, following the analogy to the law of guardianship which he had drawn earlier, the true role of the League under the mandates was as a protector of the country under tutelage:

In such circumstances, the disappearance of a guardian in the realm of municipal private law would raise no difficulty since the legal systems of States have provided means of replacing a guardian ... without any disturbance ... of the guardianship ...<sup>249</sup>

Despite the imperfect analogy, he felt that the replacement of the League by the U.N., an international organization with the same objectives, should be treated in the same manner.<sup>250</sup> He found support for his interpretation in Article 80(1) of the Charter, which preserved rights of *peoples* and the terms of existing international instruments (obviously mandates) pending trusteeship; in the assertions of the founders of the U.N. that dissolution of the League would not affect the functioning of the mandates in essence, but only in form; and in the final resolution of the League reciting the intentions of the mandatories in the period preceding trusteeship.<sup>251</sup>

## (2) *Requirements for Bringing a Proceeding Under Article 7*

The respondent's remaining arguments were directed to proving that even if Article 7 were still in force, the applicants did not meet the requirements for bringing a proceeding under it. The respondent's arguments were based on the second, third, and fourth preliminary objections: that the applicants were not "Members of the League"; that the dispute was not of the type to which the compromissory clause applied; and that there had been no negotiations to try to settle the dispute, as required by Article 7.

*Applicants Not Members of the League.* Since Article 7 provided for submission to the court of disputes between the mandatory and "another Member of the League," the respondent argued that Article 7 depended on the existence of the League for its fulfilment, "as without a League

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<sup>248</sup> Id. at 366.

<sup>249</sup> Id. at 363.

<sup>250</sup> Id. at 363.

<sup>251</sup> Id. at 363-65.

in existence there could not be a Member of the League."<sup>252</sup> The conclusions it drew from this premise were summarized by *ad hoc* Judge van Wyk:

Article 7 . . . cannot be invoked as there are no longer Members of the League to do so. The Respondent has not been a party to any agreement . . . that after the dissolution of the League ex-Members of the League or Members of the United Nations would be substituted for Member of the League in Article 7 . . . . [Therefore] Applicants have no *locus standi* and this Court no jurisdiction . . . .<sup>253</sup>

The dissenting judges proceeded to this conclusion by arguing, first, that only "another Member of the League" might invoke the jurisdiction of the court (citing the rejection of a German complaint regarding Ruanda-Urundi which was made to the Permanent Mandates Commission before Germany joined the League).<sup>254</sup>

Secondly, they contended that the phrase "another Member of the League" meant precisely what it said: "any State which, at any given moment was—and only if and so long as it was—a Member . . . ."<sup>255</sup> Since the applicants claimed that this phrase must be interpreted to mean a member of the League at the time of its dissolution (and presently a member of the U.N.), the dissenters demonstrated why, in their opinion, such an interpretation was unwarranted.

They examined in turn the various theories on which they felt the applicants might claim that "members" should be interpreted to have included "former members of the League" or "UN members," and in most instances their rejoinders were based on one or both of the two following arguments: (a) future dissolution of the League simply was not contemplated in 1920, as the repeated use of the phrase "Member of the League," rather than some broader term, indicates;<sup>256</sup> hence no broader concept of "member" could have been contemplated.<sup>257</sup> (b) Any broader meaning of "member" would have been totally unacceptable to the mandatories in 1920; the reluctance with which several of the World War I Allies submitted their conquests to the mandates regime was so great that they would never have done so at all if they had felt that in the indefinite future almost any state could haul them into court if it didn't like the way they ran their mandates.<sup>258</sup>

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<sup>252</sup> Id. at 598 (van Wyk, J., dissenting).

<sup>253</sup> Id. at 658 (van Wyk, J., dissenting).

<sup>254</sup> Id. at 508 (Spender and Fitzmaurice, JJ., dissenting); cf. Judge Jessup's comments, id. at 412.

<sup>255</sup> Id. at 508 (Spender and Fitzmaurice, JJ., dissenting).

<sup>256</sup> Id. at 599 (van Wyk, J., dissenting).

<sup>257</sup> Id. at 514 (Spender and Fitzmaurice, JJ., dissenting), 601 (van Wyk, J., dissenting).

<sup>258</sup> Id. at 453 (Winiarski, President, dissenting), 514 (Spender and Fitzmaurice, JJ., dissenting), 600 (van Wyk, J., dissenting), 608-09 (van Wyk, J., dissenting).

[In 1920] willingness to submit to compulsory adjudication at all was a comparative rarity, and would certainly not have been forthcoming for an obligation of limitless duration under unknown conditions.<sup>259</sup>

To the argument that Article 7 survived as an integral part of the mandate and that to enable it to be invoked usefully "ex-member" must be read for "member," the dissenters replied that Article 7 could survive only by giving rights to members of an "existing" League of Nations.<sup>260</sup> The court cannot, Judges Spender and Fitzmaurice admonished: "Both rely on the continued presence of Article 7 in the Mandate instrument, and refuse to apply it in accordance with the terms in which it figures there."<sup>261</sup> As to the argument that principles of third-State law might cause the rights under Article 7 to survive:

[T]hey can only survive according to their terms. The States concerned having, by their own act, divested themselves of the capacity in which they enjoyed these rights, can no longer claim them . . . for no doctrine of third-State rights can [enable] . . . third States to . . . claim rights they have themselves . . . renounced.<sup>262</sup>

Again they pointed out that rights available to persons or entities in one capacity do not continue when the capacity terminates or changes "unless special arrangements have been made to produce this result . . ."<sup>263</sup>

The dissenters indicated that in their opinion Ethiopia and Liberia were asking the court to rewrite the mandate not only to cover the dissolution of the League (in the accomplishment of which they had been voluntary cooperators!),<sup>264</sup> but also the creation of the U.N., trusteeship, etc. This the court could not undertake.<sup>265</sup> The time to have handled this problem was 1945-1946; and as they had observed in connection with earlier arguments, failure to do so was deliberate on the part of all, including representatives of the states which were now seeking revision.<sup>266</sup> Since the dissenters did not, in any case, accept the theory that Article 7 was essential for the protection of the inhabitants of the mandated territories,<sup>267</sup> they found no justification for giving an "unnatural" meaning to "Member of the League."<sup>268</sup>

Finally, the dissenting judges ruled out the argument that "ex-member" or "UN member" had been substituted for "member" under some theory of succession or of limited *de facto* survival of an entity which has been

<sup>259</sup> Id. at 514 (Spender and Fitzmaurice, JJ., dissenting).

<sup>260</sup> Id. at 517.

<sup>261</sup> Ibid.

<sup>262</sup> Id. at 509-10.

<sup>263</sup> Id. at 510.

<sup>264</sup> Id. at 509.

<sup>265</sup> Id. at 514-15.

<sup>266</sup> Id. at 515.

<sup>267</sup> Id. at 518-19.

<sup>268</sup> Id. at 599 (van Wyk, J., dissenting).

formally dissolved.<sup>269</sup> Certainly, they contended, the South African government had never agreed to any such change.<sup>270</sup> Furthermore, there was no general principle of law that when one international organization comes to an end and another one performing similar functions exists at the time, the rights of the members of the former pass to the members of the latter "irrespective of the intention of the parties."<sup>271</sup>

In refusing to accept the construction which the respondent and the dissenting judges put upon the phrase "another Member of the League," the majority stated that such a literal interpretation of the words would be contrary to their "spirit, purpose and context."<sup>272</sup> The proper reading was the one insisted upon by Judge McNair in his 1950 concurring opinion:<sup>273</sup> they should be held to be a means of identification ("descriptive of a class or category"), rather than a "*permanent condition required for the role of applicant in legal proceedings*."<sup>274</sup> Judge Jessup suggested that since the mandates were drawn during a period when the League was expected to become universal, the specification, "member," was intended to bar ex-enemies until they became League members. The reasons for such a limitation no longer applied in 1946 when the League was dissolved; hence, *cessante ratione legis, cessat ipsa lex*.<sup>275</sup> He argued extensively by analogy to the rights of missionaries of members, protected by Article 5 of the mandate; in their case the loss of the quality of member of the League "did not introduce any element of frustration which would impede the Mandatory's obligation," and he found this equally true of the obligations under Article 7.<sup>276</sup> However, he added:

If the Mandatory claimed the right to limit the privileges to . . . States which were Members . . . when the League came to an end, the claim would be reasonable and . . . avoid any charge that there was imposed on the Mandatory an obligation more onerous than that which it had originally assumed.<sup>277</sup>

Judge Bustamante's elaborate reasoning on this point harked back

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<sup>269</sup> Id. at 602-03.

<sup>270</sup> Id. at 610-11, 635, 658.

<sup>271</sup> Id. at 603.

<sup>272</sup> Id. at 336 (opinion of the court).

<sup>273</sup> SWA Status 158-59 (separate opinion of McNair, J.).

<sup>274</sup> SWA Cases 382 (separate opinion of Bustamante, J.) [emphasis by the court], 411 (separate opinion of Jessup, J. (paraphrasing McNair, J.)). Judge Jessup pointed out that under this theory the states which qualified might fluctuate from time to time (referring id. at 416-17 to the case of Brazil, also mentioned by the dissenting judges, id. at 508-09, which had voluntarily withdrawn from the League), but that at any particular moment South Africa could always identify them precisely. Id. at 414.

<sup>275</sup> Id. at 412 (separate opinion of Jessup, J.).

<sup>276</sup> Id. at 409, 411-13, 414, 416-17. However, the Rev. Michael Scott, a British national, was barred from returning to South West Africa by the South African government.

<sup>277</sup> Id. at 412-13.



to his concept of the mandate as an institution for the development of people under tutelage. The recognition of the rights of such peoples led logically to the conclusion that all members of the League were jointly and severally responsible for the fulfilment of this sacred trust of civilization.<sup>278</sup> Since the League as an organization had no effective means of enforcing this responsibility in case of a dispute with the mandatory,<sup>279</sup> the member states had been granted, by virtue of Article 7, a right of legal intervention to safeguard the interests of the peoples under tutelage;<sup>280</sup> and this right, being inherent in the mandate itself, was incorporated in the "juridical heritage" of the member states, to endure as long as the mandates.

From the entry into force of the agreement with the Mandatory, this right of intervention of other . . . Members becomes *part of the legal heritage of each* . . . not for the duration of the League . . . *but for the duration of the Mandate itself*. Possession of this right . . . thus extends beyond the life of the League . . . even if the League is dissolved before the expiry of the Mandate.<sup>281</sup> [Emphasis by the court.]

Furthermore, the majority claimed that there was an unanimous agreement among all the states, including South Africa, which met to dissolve the League<sup>282</sup> that the mandates should be continued "however imperfect the whole system would be . . . and as much as it would be operable" until new arrangements were worked out with the U.N.<sup>283</sup>

Manifestly, this continuance of obligations . . . could not begin to operate until . . . the dissolution of the League . . . and hence the literal objections derived from . . . "another Member of the League . . ." are not meaningful, since the resolution of 18 April 1946 was adopted precisely with a view to averting them and continuing the Mandate as a treaty . . .<sup>284</sup>

Judge Jessup, reverting to the South African "assurance" that it would continue to administer South West Africa in accordance with its obligations, claimed that the court would have to deny completely the bona fides of the South African government to assume that this "pledge" was made "tongue-in-cheek" in the expectation that within a few days there would be no state entitled to call the mandatory to account for the fulfilment

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<sup>278</sup> Id. at 355 (separate opinion of Bustamante, J.).

<sup>279</sup> It might seek an advisory opinion from the Permanent Court. Covenant, art. 14. According to Articles 34-35 of the statute of the Permanent Court, only "states" might be parties before the court in contentious proceedings.

<sup>280</sup> SWA Cases 337 (opinion of the court), 361-62, 378 (separate opinion of Bustamante, J.).

<sup>281</sup> Id. at 378, 382.

<sup>282</sup> The "voluntary" act of dissolution differed from the voluntary act of withdrawing from membership (cf. the case of Brazil, note 274 supra), as the War had in fact destroyed the League, and the final meetings merely solemnized the decease. Id. at 382-83 (separate opinion of Bustamante, J.). But cf. id. at 509 (Spender and Fitzmaurice, JJ., dissenting).

<sup>283</sup> Id. at 341 (opinion of the court).

<sup>284</sup> Ibid.

of its obligations. "The Court cannot thus impugn the good faith of the Respondent . . . ." <sup>285</sup>

*Article 7 Did Not Apply to Dispute.* In their memorials Ethiopia and Liberia stated that they had brought the proceedings on the basis of their "legal interest in seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated." <sup>286</sup> The respondent denied that such an interest was sufficient to give the court jurisdiction under Article 7, claiming that the interest must be "personal and direct," arising out of obligations owed individually to the applicant states or to their nationals. <sup>287</sup>

In this connection Judge Morelli raised a point which he claimed was anterior to *any* issue of jurisdiction. <sup>288</sup> He questioned whether there was, legally speaking, any "dispute" at all of which the court could take cognizance; if not, he claimed it should dismiss the proceeding before considering the respondent's objections. <sup>289</sup> According to the judge, a "dispute" existed only when there was both (a) a disagreement as to law or fact or a conflict of interests <sup>290</sup> and (b) a "manifestation of the will, at least of one of the parties, consisting in the making of a claim or of a protest." <sup>291</sup> Then, seizing on the same facts which the dissenting Commonwealth judges cited to back up their *jurisdictional* argument as to the "dispute," he argued that Ethiopia and Liberia had continually acted:

[I]n their capacity as members of a United Nations collegiate organ . . . guided not by their individual interest but by . . . the interest of the

<sup>285</sup> Id. at 419 (separate opinion of Jessup, J.).

<sup>286</sup> Memorials of Ethiopia and Liberia, pp. 62-63, SWA Cases, quoted by Judge Winiarski in SWA Cases 456.

<sup>287</sup> Ibid. (Winiarski, President, dissenting). The court summarized the South African contention on this point, that the "dispute":

[M]ust be given its generally accepted meaning in a context of a compulsory jurisdiction clause and that, when so interpreted, it means a disagreement or conflict between the Mandatory and another Member . . . concerning the legal rights and interests of such other Member in the matter before the Court . . . .

Id. at 343 (opinion of the court).

<sup>288</sup> Id. at 565 (Morelli, J., dissenting).

<sup>289</sup> Id. at 564-66, 569-70.

<sup>290</sup> Id. at 566-67. But the interest may be either supposed or real:

Each State is the judge of its own interest. If a State, believing itself to have a certain interest, advances a claim . . . or makes a protest . . . that claim or that protest may well constitute one of the elements of a dispute, independently of the real existence of the interest in question.

[I]f . . . there had been, on the part of Ethiopia and Liberia, a claim or protest directed against South Africa and relating to an interest regarded by the two former States [sic] as being their interest, the existence of a dispute could not be denied by contesting the existence of that interest. The attitude of Ethiopia and Liberia would in this respect be decisive . . . .

Id. at 570.

<sup>291</sup> Id. at 567. Such manifestation must, of course, precede the commencement of the proceeding. Id. at 568-69.

Organization. They had in mind . . . an alleged right of the Organization and not . . . a right belonging to them individually . . .<sup>292</sup>

Hence they failed to demonstrate the second of the two necessary elements of a dispute.

The court, however, quickly dismissed this contention. After noting that the mere assertion of a dispute could not prove its existence any more than a denial could establish its nonexistence, the majority held that, although a mere conflict of interests did not constitute a dispute, proof that the claim of one party was "positively opposed" by the other was sufficient.<sup>293</sup> Tested by this criterion, the "opposing attitudes relating to the performance of the obligations of the Mandate by the . . . Mandatory" clearly did constitute a dispute.<sup>294</sup>

Then, since Article 7 provided for the submission to the court of "any dispute whatever . . . relative to the interpretation or the application . . . of the Mandate," the burden seemed to fall on the respondent to demonstrate what Judge Winiarski stated so flatly: "These words clearly do *not* mean any dispute whatsoever . . ."<sup>295</sup>

The first argument was based on the general principle that a state may institute proceedings before the court only if it has "a subjective right, a real and existing individual interest which is legally protected."<sup>296</sup> In this case the dissenting Commonwealth judges, employing Judge Morelli's evidence to prove the jurisdictional issue, argued that Ethiopia and Liberia had no personal quarrel with the Republic of South Africa, but merely the same "political conflict of view" as many other U.N. members relating to the conduct of the South West Africa mandate.<sup>297</sup> It was common knowledge that the real dispute was between the General Assembly and the Republic, and the applicants admitted that they had acted "at the instance of the Assembly" to uphold the mandate for the benefit of the inhabitants of the territory, not in their own interest. On that ground alone the judges claimed that there was no dispute between South Africa and the applicants "in their individual capacities."<sup>298</sup>

The relevant documents were alleged to support this view. A comparison of "A," "B," and "C" mandates showed that the "A" mandates con-

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<sup>292</sup> Id. at 571.

<sup>293</sup> Id. at 328 (opinion of the court).

<sup>294</sup> Ibid.

<sup>295</sup> Id. at 455 (Winiarski, President, dissenting). [Emphasis added.]

<sup>296</sup> Ibid.

<sup>297</sup> Id. at 549 (Spender and Fitzmaurice, JJ., dissenting).

[F]or all the difference it would have made to the essential character of the present proceedings, these might just as well have been brought by any other States coming within the category of ex-Members of the former League of Nations. The pleadings could have been identical, apart from the name of the plaintiffs.

Ibid.

<sup>298</sup> Id. at 548.

tained no "sacred trust of civilization" clause although they did have adjudication clauses similar to Article 7; hence, the dissenting judges contended, the adjudication clauses must have been intended to refer to disputes about interests common to all the mandates, that is, to the direct interests of the League members (and their nationals) in the mandated territories.<sup>299</sup> Along the same line, Judge Winiarski pointed out that the compromissory clause related to disputes which "cannot be settled by negotiation." This phraseology, he claimed, was lifted from traditional arbitration clauses and referred to a dispute in "the classic sense," "a dispute which by its nature lends itself to settlement by negotiation but which in a particular case cannot be so settled." However, a dispute can be so settled only when the parties can deal freely with their rights and interests; since the applicants acted as representatives of the U.N. Assembly, their dispute was *not* one which could be settled by negotiation and hence was not one of which the court could be seized.<sup>300</sup> Furthermore, the judge contended that the requirement of Article 62 of the statute of the court, that a state demonstrate "an interest of a legal nature" to intervene in proceedings,<sup>301</sup> should be applied to proceedings brought under Article 7 of the mandate.<sup>302</sup> And Judge van Wyk, still unconvinced that the League Council was empowered to add the "new" security of Article 7 to the mandate,<sup>303</sup> felt it could be valid only if limited to disputes about the direct interests of the complainant state.<sup>304</sup>

According to the dissenting judges the history of the mandate supported their interpretation of the general law. The only discussion of Article 7 during the drafting of the mandate was in connection with the commercial and other national rights clauses.<sup>305</sup> It was inconceivable that any interpretation of the adjudication clause which would have extended it to cover "conduct of the mandate" cases could have been introduced without "violent debates" or references in the *travaux préparatoires* and, more important, without saying so explicitly.<sup>306</sup> For, as it was reiterated in connection with almost every objection, the mandates were reluctant to submit to *any* mandates regime and certainly to

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<sup>299</sup> Id. at 559.

<sup>300</sup> Id. at 457 (Winiarski, President, dissenting).

<sup>301</sup> Stat. Int'l Ct. of Just., art. 62, ¶ 1 reads:

Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

<sup>302</sup> SWA Cases 455-56 (Winiarski, President, dissenting).

<sup>303</sup> Id. at 660-61 (van Wyk, J., dissenting); see text accompanying note 138 *supra*.

<sup>304</sup> SWA Cases 661 (van Wyk, J., dissenting).

<sup>305</sup> Id. at 555-56, 558 (Spender and Fitzmaurice, JJ., dissenting).

<sup>306</sup> Id. at 453 (Winiarski, President, dissenting), 601 (van Wyk, J., dissenting).

one which could have exercised any effective control over the way they ran their mandates.<sup>307</sup>

It is not reasonable to *assume* that they would have agreed to . . . supervision by every Member and every ex-Member . . . armed with the right to institute legal proceedings . . . whenever it was considered that the Mandate had been breached or abused. [Emphasis by the court.]<sup>308</sup>

The compromissory clause, interpreted as the applicants urged, would have created an *actio popularis*, "a novelty in international relations, going far beyond the novelty of the Mandates system itself in its implications . . . ."<sup>309</sup> Judge Winiarski pointed out that the wording of the clause had been changed by the Council to make the mandatory only subject to the court's compulsory jurisdiction<sup>310</sup> because "Members of the League other than the Mandatory could not be forced against their will to submit their differences to the Permanent Court . . . ."<sup>311</sup> He concluded that if the Powers were so careful not to bind member states without their consent, they would hardly have granted them such a novel right of action under Article 7 without saying so expressly.<sup>312</sup>

The subsequent practice of the League was then cited to confirm the contention that the court was not intended to exercise judicial control over the mandates—a control which could only have conflicted with that of the Council and "diluted" the latter's authority, the dissenting judges noted.<sup>313</sup> In the first authoritative reports made to the Council of the League in 1920 by the then Belgian representative on the role of the various League organs in relation to the mandates the Permanent Court was not mentioned.<sup>314</sup> The League Council, throughout its twenty-five years of existence, exercised its supervision by essentially political methods, with the assistance of qualified experts, but without once referring to the Permanent Court for an advisory opinion despite the urging of the Permanent Mandates Commission.<sup>315</sup> In the same period

<sup>307</sup> Id. at 453 (Winiarski, President, dissenting), 559 (Spender and Fitzmaurice, JJ., dissenting), 600-01 (van Wyk, J., dissenting), 608-09 (van Wyk, J., dissenting).

<sup>308</sup> Id. at 600-01 (van Wyk, J., dissenting).

<sup>309</sup> Id. at 453 (Winiarski, President, dissenting).

<sup>310</sup> See text accompanying note 34 *supra*.

<sup>311</sup> SWA Cases 453 (Winiarski, President, dissenting) quoting Viscount Ishii's report on the reason for the change. Viscount Ishii's report is also cited at id. at 397 (separate opinion of Jessup, J.), 597 (van Wyk, J., dissenting).

<sup>312</sup> SWA Cases 453 (Winiarski, President, dissenting).

<sup>313</sup> Id. at 553-54 (Spender and Fitzmaurice, JJ., dissenting).

<sup>314</sup> Id. at 451 (Winiarski, President, dissenting). The so-called "Hymans Reports," dated Aug. 5, 1920, and Oct. 26, 1920, are also referred to in the other opinions. Id. at 352-53 (separate opinion of Bustamante, J.), 390-92 (separate opinion of Jessup, J.), 484-85 (Spender and Fitzmaurice, JJ., dissenting).

A Council report to the Assembly, dated Dec. 6, 1920, on League responsibilities under Article 22 (mandates) similarly ignored judicial supervision. SWA Cases 451 (Winiarski, President, dissenting).

<sup>315</sup> Id. at 454.

only one case was taken to the court under the adjudication clause of any mandate; and that case involved the alleged violation of commercial rights of a Greek national.<sup>316</sup> Finally, leading commentators consistently ignored any possibility of supervision by the Permanent Court, as did an official publication on the mandates system issued by the League itself in 1945.<sup>317</sup>

The majority met the respondent's arguments squarely. First of all, they pointed out, there clearly was a dispute—a truth which U.N. records before the court abundantly documented.<sup>318</sup> Secondly, the dispute concerned the interpretation or application of the mandate.<sup>319</sup> Thirdly, the dispute was within:

[T]he natural and ordinary meaning . . . of "any dispute whatever" . . . . The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating . . . to "the provisions" of the Mandate, obviously meaning all or any provisions . . . .

. . . . Protection of the material interests of the Members or their national is of course included within its compass, but the well-being and development of the inhabitants of the Mandated territory are not less important.<sup>320</sup>

Referring first to the more technical issues of legal construction, the concurring judges argued that the court had no right to investigate the "jurisdictional facts" concerning the merits of the applicants' interest as long as it related to interpretation or application of the mandate.<sup>321</sup> The requirement of an "interest of a legal nature" for intervention found in Article 62 of the court's statute was not applicable to Article 36, which established the general jurisdiction of the court, for its jurisdiction clearly included "all *cases* which the parties refer to it and all *matters* specially provided for in the [U.N.] Charter . . . or in treaties and conventions in force."<sup>322</sup> Moreover, the provisions of both Articles 36 and 38<sup>323</sup> made it obvious that the scope of the court's jurisdiction, as to facts as well as to law, depends on the will of the parties: "The

<sup>316</sup> Ibid. See note 143 supra.

<sup>317</sup> SWA Cases 451-52 (Winiarski, President, dissenting). Judge Winiarski indicated, however, that some jurists did favor general supervision to which any League member could subject a mandatory by bringing it before the Permanent Court. Id. at 451.

<sup>318</sup> Id. at 381 (separate opinion of Bustamante, J.).

<sup>319</sup> Id. at 424 (separate opinion of Jessup, J.), 446 (separate opinion of Mbanefo, J.).

<sup>320</sup> Id. at 343-44 (opinion of the court).

<sup>321</sup> Id. at 423-24 (separate opinion of Jessup, J.), 447 (separate opinion of Mbanefo, J.).

<sup>322</sup> Id. at 433 quoting Charter, art. 36, ¶ 1. [Emphasis by the court.] Judge Jessup pointed out that a state is entitled to ask the court for an "abstract interpretation" of a treaty. SWA Cases 433 (separate opinion of Jessup, J.).

<sup>323</sup> Article 38(1) of the statute of the court defines the sources to be applied by the court in deciding disputes in accordance with international law; they include international conventions and custom, general principles recognized by civilized nations, and judicial decisions and teachings of eminent scholars.

Court is always competent once the latter [*i.e.*, the parties] have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it."<sup>324</sup> Finally, they found the fact that Article 22 of the Covenant did not mention compulsory jurisdiction was no reason to interpret narrowly the adjudication clause: Article 7 clearly implemented the securities of Article 22; it was mutually agreed upon by the victorious Allies and proposed to the Council by the British representative on behalf of the Union; and in the words of Article 7: "The Mandatory agrees . . . ."<sup>325</sup>

Judge Jessup then referred to the so-called "Tanganyika clause," unique to the mandate for German East Africa (Tanganyika), which provided that League members might bring actions before the Permanent Court on behalf of their nationals for violation of their rights. This provision followed a compromissory clause substantially identical with that in Article 7(2) of the South West Africa mandate. His conclusion was that the latter must mean "something different from, or more than, what is meant by the Tanganyika clause" or there would have been no reason to include it.<sup>326</sup> (The dissenters considered the Tanganyika clause a sport and suggested that it probably was derived from the original draft proposed by the American representative in 1919, which was somehow not conformed to the accepted final version.<sup>327</sup>)

On historical, ethical, and philosophic grounds the majority countered the respondent's emphasis on the mandatories' desire for unfettered control of conquered territory with the professed ideals of the victors after World War I. Returning to his basic theories as to the nature of the mandates, Judge Bustamante argued that since the establishment of Article 22 of the Covenant every League member had borne a trust, not merely "moral" or "humanitarian," but also "undeniably legal," to provide for the well-being and development of former colonial peoples. Hence Article 7 must be interpreted as giving each individual member the power to enforce the trust, more especially since the League could not itself enter into contentious proceedings.<sup>328</sup>

In equally philosophical terms Judge Jessup argued that the mandates were only one of four instances in which postwar statesmen had recognized that every country had an interest in events everywhere in the world. The others included the recognition in Article II of the Covenant

<sup>324</sup> SWA Cases 423 (separate opinion of Jessup, J.) quoting Upper Silesia (Minority Schools), P.C.I.J., ser. A, No. 15, at 22.

<sup>325</sup> SWA Cases 343-44 (opinion of the court).

<sup>326</sup> *Id.* at 431 (separate opinion of Jessup, J.).

<sup>327</sup> *Id.* at 453-54 (Winiarski, President, dissenting), 559-60 (Spender and Fitzmaurice, J.J., dissenting).

<sup>328</sup> *Id.* at 380 (separate opinion of Bustamante, J.).

that peace was indivisible, the protection of minorities, and the establishment of the International Labor Organization.<sup>329</sup> It followed, therefore, that Article 7 was intended "to recognize and to protect the general interests of Members of the international community in the Mandates System just as somewhat comparable clauses recognize this broad interest in the minority treaties, [etc.] . . . ."<sup>330</sup> In any case, he pointed out, international law recognizes legal interests in issues which do not affect the economic or other tangible interests of a state, such as the suppression of the slave trade, the ending of forced labor, the prevention of genocide, etc.<sup>331</sup> A state might have a recognizable interest in the observance in the territory of another state of general welfare treaty provisions, he asserted, "without alleging any impact upon its own nationals or its direct so-called tangible or material interests . . . ."<sup>332</sup> In view of the broad language of Article 7 and the lack of any intrinsic evidence of a limitation on its literal sense, the interest of Ethiopia and Liberia in the administration of South West Africa sufficed, particularly in view of the regional interest of all African States in events in other parts of the same continent.<sup>333</sup>

Judge Jessup added, citing American cases, that there was no reason why the court could not pass on the sort of abstract questions which might arise if states disputed intangible interests.<sup>334</sup> Nor, on the basis of comparable objections overruled in cases relating to the minorities treaties, would ultimate resort to the judiciary in cases which could not be resolved politically confuse the roles of normal supervisory organs or undermine their authority.<sup>335</sup>

*No Requisite Negotiations.* Since Article 7 provided compulsory jurisdiction only as to disputes which "cannot be settled by negotiation," the respondent's last objection was that there had been no negotiations at all between Ethiopia and/or Liberia on the one hand and the Republic of South Africa on the other.<sup>336</sup>

Assuming the existence of a dispute—which, in law, they denied—the dissenting Commonwealth judges found that as of the date the action was commenced there had been nothing but a disagreement between the U.N. General Assembly as an entity and the Republic of South Africa.

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<sup>329</sup> Id. at 429 (separate opinion of Jessup, J.).

<sup>330</sup> Id. at 432.

<sup>331</sup> Id. at 425-28, 432.

<sup>332</sup> Id. at 428.

<sup>333</sup> Id. at 431-32.

<sup>334</sup> Id. at 428-29 citing *Engel v. Vitale*, 370 U.S. 421 (1962); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Reynolds v. United States*, 98 U.S. 244 (1879).

<sup>335</sup> SWA Cases 432 (separate opinion of Jessup, J.).

<sup>336</sup> Id. at 561 (Spender and Fitzmaurice, JJ., dissenting).



[A] "negotiation" *confined* to the floor of an international Assembly, consisting of allegations . . . resolutions . . . denial of allegations, refusal to comply . . . cannot be enough to justify the Court in holding that the dispute "cannot" be settled . . . when no direct diplomatic interchanges have ever taken place between the parties . . . . [Emphasis by the court.]<sup>337</sup>

Furthermore, they added, the requirement of Article 7 presupposes that the dispute is of a type inherently capable of being settled by negotiation (or else the requirement would be meaningless). But Ethiopia and Liberia could not make an agreement with the Republic which would bind the Assembly or any other interested state. Hence there was a lack of mutuality of obligation, and the dispute was nonnegotiable; therefore it was by its nature not subject to Article 7.<sup>338</sup> (The judges added that they felt that disputes as to a "sacred trust of civilization" were inherently nonnegotiable.)<sup>339</sup>

The court's answer to this objection was less concerned with the strict legal arguments than with the factual situation. Technically, the response was that "parliamentary diplomacy" was as adequate as direct diplomatic exchanges at the state level.<sup>340</sup> As Judge Bustamante pointed out, the wording of Article 7 did not prescribe any particular form of negotiation; therefore any method was sufficient which did not conflict with international custom.<sup>341</sup> The important point, said Judge Jessup, was that:

Respondent was made aware of the complaints of Applicants, had an opportunity to state its point of view, did state it, and that Applicants were not persuaded but still maintained their positions . . . .<sup>342</sup>

Judge Bustamante added that he could think of no better place than the U.N. to conduct negotiations since the litigants were represented there by accredited diplomats and since the institution always had available its documentation, experts, and other assistance.<sup>343</sup>

However, the clinching fact for the majority was that there had been permanent deadlock for fifteen years as a result of the "fundamental opposition of points of view" and in spite of all efforts to find a "con-

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<sup>337</sup> Id. at 561-62.

<sup>338</sup> Id. at 551-52.

<sup>339</sup> Id. at 552.

<sup>340</sup> Id. at 346 (opinion of the court).

If it [the issue] is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition.

*Ibid.*

<sup>341</sup> Id. at 384 (separate opinion of Bustamante, J.).

<sup>342</sup> Id. at 436 (separate opinion of Jessup, J.).

<sup>343</sup> Id. at 384-85 (separate opinion of Bustamante, J.).

ciliatory solution."<sup>344</sup> The question, said the court, was what were the chances of success of further interchanges; and the answer was, clearly, nil.<sup>345</sup> It was left for an American summation: "In this respect States are not eternally bound by the old adage: 'If at first you don't succeed, try, try again.'"<sup>346</sup>

#### THE NEXT SCENE

By the narrow margin of eight-seven the International Court dismissed the preliminary objections of the Republic of South Africa and prepared to hear the charges against that country concerning its administration of South West Africa. The effect of the decision was to compel the respondent to submit evidence concerning the issues raised or to accept, in effect, a default judgment against it.<sup>347</sup> From its conduct the Republic has apparently decided to argue the case on its merits.<sup>348</sup>

If the court finds the applicants' evidence as overwhelming as the vast majority of the U.N. Assembly has, it will presumably have to decide in favor of Ethiopia and Liberia. The most fascinating questions, therefore, which the (possibly) ultimate scene in the International Court will pose are the form and scope of the judgment and the action which the international community will take to enforce it if the South African government elects to flout the world's judicial authority as it has flouted its moral judgment over the years.

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<sup>344</sup> Id. at 385.

<sup>345</sup> Id. at 345-46 (opinion of the court).

<sup>346</sup> Id. at 435 (separate opinion of Jessup, J.).

<sup>347</sup> Hence the wording of the applications: "May it please the Court, to adjudge and declare, whether the Government of the Union of South Africa is present or absent . . . that . . . ." Set forth by the court, id. at 322. The memorials, set forth id. at 324, use the same phraseology.

<sup>348</sup> It has sought and obtained a delay for filing documents in connection with a defense on the merits, according to a counsel for the applicants.